Criminal Procedure

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Criminal Procedure

Criminal Procedure; admissibility of voluntary intoxication

Penal Code § 22 (amended).
SB 121 (Thompson); 1995 STAT. Ch. 793

Existing law provides that when a specific intent crime\(^1\) is charged, evidence of voluntary intoxication\(^2\) will be admissible to negate the formation of the required intent.\(^3\) However, when a general intent crime\(^4\) is charged, existing law does not allow the admission of voluntary intoxication to negate the formation of the required intent.\(^5\) Existing law further provides that voluntary intoxication is not admissible to negate a defendant’s capacity to form any requisite mental state.\(^6\) Under prior law, voluntary intoxication would be admissible as to whether

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1. See People v. Hood, 1 Cal. 3d 444, 457, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969) (stating the general rule that a crime is one of specific intent if the definition of the crime requires that the defendant intend to do a further act or achieve an additional result); see also CAL. PENAL CODE § 20 (West 1988) (requiring a union between the act and the required intent to institute a crime); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 109 (1993) (discussing the requirement that a defendant committing a specific intent crime possess one of the following mental states: (1) intent to commit a future act not included in the crime’s actus reus, (2) distinctive motive leading to the commission of the crime’s actus reus, or (3) awareness of an attendant circumstance to the crime); id. (noting also that the mental state of intent or knowledge generally characterizes specific intent); cf. MODEL PENAL CODE § 2.02 (1974) (dispensing with the distinction between specific intent and general intent). See generally B.E. WrrKN & NOAR L. EPSTEIN, CALIFORNIA CRIMINAL LAW, Elements of Crime § 101 (2d ed. 1988 & Supp. 1995) (illustrating certain specific intent crimes).

2. See CAL. PENAL CODE § 22(c) (amended by Chapter 793) (defining “voluntary intoxication” as the voluntary introduction by any means of an intoxicating substance into one’s body); cf. ALA. CODE § 13A-3-2(c)(2) (1994) (defining “voluntary intoxication” as intoxication resulting from substances knowingly introduced into the body).

3. CAL. PENAL CODE § 22(b) (amended by Chapter 793).

4. See Hood, 1 Cal. 3d at 456-57, 462 P.2d at 378, 82 Cal. Rptr. at 626 (defining a “general intent crime” as a crime consisting of only the description of the particular act constituting the crime); see also DRESSLER, supra note 1 (defining “general intent” as the mental state included within the definition of the crime relating to the actions that constitute the actus reus of the crime); id. (noting also that the mental states of negligence and recklessness are applicable to general intent); cf. MODEL PENAL CODE § 2.02 (1974) (showing that the Model Penal Code does not distinguish between the common law concepts of specific intent and general intent).

5. CAL. PENAL CODE § 22(b) (amended by Chapter 793).

6. Id. § 22(a) (amended by Chapter 793); see id. § 28(b) (West 1988) (establishing that evidence of mental disease shall not be admissible to negate the capacity of a defendant to form any requisite mental state but shall be admissible on the issue of whether plaintiff formed specific intent, if a specific intent crime is charged); see also People v. Whitfield, 7 Cal. 4th 437, 447, 868 P.2d 272, 276, 27 Cal. Rptr. 2d 858, 862 (1994) (commenting that the Legislature's abandonment of the diminished capacity defense via the enactment of Chapter 404 in 1981 allowed the retention of the general rule that evidence of voluntary intoxication is admissible to whether the defendant actually formed the required mental state). See generally 1982 Cal. Stat. ch. 893, sec. 5, at 3318 (amending CAL. PENAL CODE §§ 21, 22, 28, 188) (clarifying that the 1981 enactments were applicable only to crimes in which a specific intent was required); 1981 Cal. Stat. ch. 404, sec. 4, at 1592 (enacting CAL. PENAL CODE § 28) (abandoning the common law diminished capacity defense).
or not a defendant actually harbored malice aforethought,
under either an express or implied malice aforethought theory, when murder was charged. Chapter 793 provides
that when murder is charged, voluntary intoxication is admissible only as to whether or not the defendant actually harbored express malice aforethought.

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7. See CAL. PENAL CODE § 187(a) (West 1988) (requiring malice aforethought as an element of murder); id. § 188 (West 1988) (providing that malice aforethought may be categorized as either express or implied); see also DRESSLER, supra note 1, at 449 (laying out the four common law mental states constituting malice aforethought: (1) intention to kill a human being, (2) intention to cause serious bodily injury to another person, (3) extreme recklessness disregard for human life, and (4) intent to commit a felony and a subsequent death occurs); cf. CAL. PENAL CODE § 7(4) (West 1988) (defining "malice" as an intent to do a wrongful act). See generally WITKIN & EPSTEIN, supra note 1, § 107 (stating that although there is no unanimity as to a precise definition, malice does not require premeditation, nor does it require hatred or the intent to injure).

8. See CAL. PENAL CODE § 188 (West 1988) (defining "express malice" as a deliberate intention to unlawfully take away the life of another human being); see also People v. Bobo, 229 Cal. App. 3d 1417, 1433, 271 Cal. Rptr. 277, 286 (1990) (stating that the intention to unlawfully kill will satisfy the requirements of express malice). See generally DRESSLER, supra note 1, at 449 (defining "express malice" as the intent to kill another human being).

9. See CAL. PENAL CODE § 188 (West 1988) (stating that implied malice is present when (1) no considerable provocation has occurred, or (2) the situation evidences an abandoned and malignant heart); see also People v. Benitez, 4 Cal. 4th 91, 104, 840 P.2d 969, 976, 13 Cal. Rptr. 2d 864, 871 (1992) (holding that malice will be implied when an act endangering the life of another is committed by a person with conscious disregard); People v. Contreras, 26 Cal. App. 4th 944, 954, 31 Cal. Rptr. 2d 757, 762 (1994) (requiring that implied malice involve not only a conscious disregard for human life, but also an element of wantonness absent in gross negligence). See generally DRESSLER, supra note 1, at 449 (defining "implied malice" as an indifference to human life).

10. See CAL. PENAL CODE § 187(a) (West 1988) (defining “murder” as the unlawful killing of a human or fetus with malice aforethought); id. § 188 (West 1988) (defining “malice” in the context of murder); see also People v. Alvarado, 232 Cal. App. 3d 501, 505, 283 Cal. Rptr. 479, 481 (1991) (explaining the relationship between specific intent and murder: (1) specific intent to kill is a requisite of first-degree murder, and (2) express malice requires the establishment of a specific intent to kill).

11. 1981 Cal. Stat. ch. 404, sec. 4, at 1592 (enacting CAL. PENAL CODE § 28); see Whiffen, 7 Cal. 4th at 447, 868 P.2d at 276, 27 Cal. Rptr.2d at 862 (announcing that the Legislature’s failure to distinguish between express and implied malice aforethought in the 1981 amendment is consistent with the general rule that evidence of voluntary intoxication is admissible to negate the formation of either express or implied malice aforethought). See generally People v. Ray, 14 Cal. 3d 20, 30 n.9, 533 P.2d 1017, 1023 n.9, 120 Cal. Rptr. 377, 383 n.9 (1975) (establishing that the defendant was entitled to jury instructions regarding voluntary intoxication regardless of whether malice was implied or express).

12. CAL. PENAL CODE § 22(b) (amended by Chapter 793); cf. IND. CODE ANN. § 35-41-3-5(b) (West 1986) (allowing voluntary intoxication as a defense only when the phrases “with intent to” or “with an intention to” are elements of the crime); TENN. CODE ANN. § 39-11-503(a) (1991) (establishing that intoxication, whether voluntary or involuntary, is admissible if relevant to negate a culpable mental state); UTAH CODE ANN. § 76-2-306 (1995) (providing that voluntary intoxication is immaterial if recklessness or criminal negligence constitutes an element of the crime). Compare CAL. PENAL CODE § 22(b) (amended by Chapter 793) (limiting the admissibility of voluntary intoxication solely as to whether or not a defendant formed the requisite specific intent with ALA. CODE § 13A-3-2(a) (1994) (allowing the admission of voluntary intoxication whenever required to negate an element of the charged offense), NEV. REV. STAT. ANN. § 193.220 (Michie 1992) (allowing voluntary intoxication to be considered when determining purpose, motive, or intent), and N.Y. PENAL LAW § 15.25 (McKinney’s 1987) (providing that intoxication is only a defense if it is relevant to dispute an element of the charged violation). See generally SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 121, at 1 (Mar. 28, 1995) (explaining when evidence of voluntary intoxication was admissible prior to the enactment of Chapter 793).
The purpose of Chapter 793 is to differentiate between express malice aforethought and implied malice aforethought when a defendant is charged with murder and evidence of voluntary intoxication is being offered for admittance. Chapter 793 is in direct response to People v. Whitfield, which held that evidence of voluntary intoxication was admissible as to whether or not the defendant actually harbored malice aforethought when the prosecution sought to establish implied malice aforethought. In Whitfield, the defendant claimed that he did not possess the requisite implied malice because he was unconscious at the time of the accident.

In the immediate aftermath of Whitfield, evidence of voluntary intoxication had the contradictory effect of both aggravating and mitigating the defendant's liability. Prior to Chapter 793, a murder charge rebuked by a successful invocation of the voluntary intoxication defense would generally yield a manslaughter conviction. Under Chapter 793, when a defendant is charged with murder, a successful application of the voluntary intoxication defense will most likely result in a verdict of second-degree murder.

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13. Senate Floor, Committee Analysis of SB 121, at 2 (May 23, 1995); see Assembly Committee on Public Safety, Committee Analysis of SB 121, at 4 (July 11, 1995) (stating that the court in People v. Whitfield emphasized that because the Legislature did not distinguish between express and implied malice aforethought, it may be presumed that voluntary intoxication is admissible to demonstrate whether or not the defendant actually harbored either type of malice).


15. Whitfield, 7 Cal. 4th at 441, 868 P.2d at 272-73, 27 Cal. Rptr. 2d at 859; see id. (holding also that the trial court did not err by refusing to grant the defendant's request to provide additional jury instructions concerning whether or not the defendant was unconscious when the killing occurred).

16. Id. at 444, 868 P.2d at 273, 27 Cal. Rptr. 2d at 860; see id. (noting that the defendant had a 0.24% blood-alcohol content); Assembly Committee on Public Safety, Committee Analysis of SB 121, at 2 (July 11, 1995) (providing that as a result of the decision in Whitfield, a defendant charged with second-degree murder can now utilize his or her own voluntary intoxication by making claims that "I was too high on heroin" or "I was too drunk" to disprove culpability).

17. See Assembly Committee on Public Safety, Committee Analysis of SB 121, at 4 (July 11, 1995) (asserting that this effect is known as the Whitfield Dilemma, because Whitfield provided that voluntary intoxication evidence may be used to mitigate a defendant's liability to involuntary or vehicular manslaughter, but California law allows an increase in the defendant's liability from vehicular manslaughter to second-degree murder in aggravated drunk driving cases).

18. See Cal. Penal Code § 192(a)-(c) (West Supp. 1995) (establishing three types of manslaughter, each of which are characterized by the killing of a human being without malice as: (1) voluntary, (2) involuntary, and (3) vehicular); see also People v. Coad, 181 Cal. App. 3d 1094, 1106, 226 Cal. Rptr. 386, 392 (1986) (providing that the absence of malice distinguishes voluntary manslaughter from murder).

19. Senate Committee on Appropriations, Committee Analysis of SB 121, at 1 (Apr. 24, 1995); see People v. Saille, 54 Cal. 3d 1103, 1117, 820 P.2d 588, 596, 2 Cal. Rptr. 2d 364, 372 (1991) (establishing that evidence of voluntary intoxication giving rise to reasonable doubt will support only an involuntary manslaughter conviction); see also Senate Floor, Committee Analysis of SB 121, at 2 (May 23, 1995) (stating that the proponents of SB 121 believe that a defendant charged with second-degree murder should not be entitled to mitigate the charge to voluntary manslaughter). But see Ramon Coronado, Jury Opt for Verdict of Murder in Shooting, Sacramento Bee, Mar. 25, 1995, at B1 (discussing the failure of a jury to return an involuntary manslaughter verdict against a defendant claiming that he was too intoxicated to realize the extent of his conduct where the prosecution charge was second-degree murder).
likely result in a second-degree murder\textsuperscript{20} conviction.\textsuperscript{21}

\textit{J. Scott Alexander}

\section*{Criminal Procedure; arraignments—use of audiovideo communications}

Penal Code § 977.2 (new).
SB'840 (Beverly); 1995 STAT. Ch. 367

Existing law provides that where a court, with a defendant's consent,\textsuperscript{1} allows the initial court appearance or arraignment\textsuperscript{2} of the defendant to be conducted by two-way audiovideo communication, the defendant's attorney is required to be present with the defendant if the defendant is represented by counsel.\textsuperscript{3} Existing law also allows the judge to accept a guilty or no contest plea from a defendant who is not actually in the court room.\textsuperscript{4}

\textsuperscript{20} See \textit{CAL PENAL CODE} § 189 (West Supp. 1995) (defining "second-degree murder" as any kind of murder that does not constitute first-degree murder).

\textsuperscript{21} \textit{SENATE FLOOR, COMMITTEE ANALYSIS OF SB 121}, at 1 (Apr. 24, 1995); see \textit{id}. (arguing that the application of the voluntary intoxication defense under existing law is rare; therefore the enactment of a narrower defense would entail only a nominal increase in prison population); \textit{SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 121}, at 2 (May 23, 1995) (providing that opponents to SB 121 argued the enactment of SB 121 is juxtaposed to the traditional rule that a defendant can only be convicted of murder if he or she actually harbored either express or implied malice aforethought).

\textsuperscript{1} \textit{See CAL PENAL CODE} § 977(c) (West Supp. 1995) (requiring that the defendant's consent must be given by written waiver); \textit{Johnson v. Zerbst}, 304 U.S. 458, 464 (1938) (explaining that a "waiver" is "an intentional relinquishment or abandonment of a known right or privilege"); see also \textit{CAL PENAL CODE} § 977(b)(2) (West Supp. 1995) (providing the recommended form for a waiver of the defendant's right to be present).

\textsuperscript{2} \textit{See CAL PENAL CODE} § 988 (West 1985) (stating that an arraignment includes a reading of the accusatory pleading and a plea by the defendant); see also \textit{id}. § 977(a)(1) (West Supp. 1995) (providing that a defendant may appear by counsel for a misdemeanor); \textit{id}. § 977(b)(1) (West Supp. 1995) (allowing a defendant charged with a felony to waive the right to be present at his or her criminal proceedings).

\textsuperscript{3} \textit{Id}. § 977(a)(1) (West Supp. 1995); cf. \textit{KAN. STAT. ANN.} § 22-3205(b) (Supp. 1994) (permitting audiovideo arraignments at the discretion of the court); \textit{LA. CODE CRIM. PROC. ANN. art. 551(B) (West Supp. 1995) (allowing for a defendant to be arraigned by simultaneous audiovideo transmission); \textit{MICH. COMP. LAWS ANN.} § 767.37a(1), (2) (West Supp. 1995) (providing that a court may conduct an arraignment by closed-circuit television unless the defendant requests physical presence and if the system allows for communication between the judge, defendant, and opposing counsel); \textit{MONT. CODE ANN.} § 46-12-201 (1993) (setting forth the procedures for an audiovideo arraignment); \textit{N.C. GEN. STAT.} § 15A-941(b) (Supp. 1994) (permitting audiovideo arraignments in noncapital cases); \textit{N.M. RULES OF PROC. MUN. CT.} 8-501(E) (Michie Supp. 1990) (permitting the use of audiovideo communication for the first court appearance of the defendant where the defendant and the defendant's counsel are together in one room, and the judge, counsel, and defendant can communicate with each other while being heard and viewed in the courtroom by members of the public).

\textsuperscript{4} \textit{CAL PENAL CODE} § 977(g) (West Supp. 1995); see \textit{id}. (allowing the court to accept a guilty or no contest plea to a misdemeanor charge without the defendant's presence); \textit{id}. (providing that a guilty or no contest plea to a felony can only be accepted in the defendant's absence if the parties agree to it); see also \textit{id}. § 1043(d) (West 1985) (requiring the defendant's presence in a felony case during trial unless he or she has waived this right); People v. Johnson, 6 Cal. 4th 1, 18, 859 P.2d 673, 679, 23 Cal. Rptr. 2d 593, 599 (1993).
Chapter 367 authorizes the Department of Corrections\(^5\) to establish a three-year pilot project\(^6\) permitting initial court appearances and arraignments for new charges\(^7\) brought against defendants incarcerated in a state prison, to be conducted by two-way audiovideo communication without requiring the defendant’s consent.\(^8\)

**COMMENT**

Chapter 367 is the progeny of a similar 1983 program conducted in Sacramento and San Diego Counties.\(^9\) These audiovideo arraignment programs\(^10\) were designed to reduce the costs and security risks involved in transporting prisoners to in-court appearances as well as to diminish prisoner discomfort from pre-arraignment detention in holding cells.\(^11\) Chapter 367 ensures the cost-
effectiveness of audiovideo arraignment programs by removing the requirement that the prisoner consent to the program. ¹²

Chapter 367 was criticized as infringing on the prisoner's right to be present in the courtroom. ¹³ Opponents also expressed concern that prisoners might not be able to confer adequately with their counsel during these hearings. ¹⁴

A. James Kachmar

Criminal Procedure; arrest warrants

Penal Code § 817 (new); §§ 813, 826 (amended).  
SB 33 (Peace); 1995 STAT. Ch. 563

financial burden of transporting prisoners to court); Paul Schneider, Video Links Proposed for Court Systems Face Budget, Constitutional Hurdles, ARIZ. BUS. GAZETTE, Oct. 6, 1994, at A1 (predicting that video-arraignments will probably eliminate the considerable costs of arraigning defendants); id. (noting that video-arraignments make proceedings safer because suspects are kept separated); Dean Takahashi, Video-Link System Would Allow Courts to Arraign by Phone, L.A. TIMES, May 7, 1992, at D5 (arguing that video-arrangement systems are critical in emergency situations, such as riots, where large numbers of defendants must be arraigned quickly to meet the 48-hour deadline for charging them); see also Patricia Raburn-Remfry, Due Process Concerns in Video Production of Defendants, 23 STETSON L. REV. 305, 806-07 (1994) (describing the time-consuming and uncomfortable procedure involved in preparing prisoners for transportation to their hearings on a typical morning in the Los Angeles County Jail).

¹². SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 840, at 3 (Apr. 18, 1995); see ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 840, at 2 (July 5, 1995) (reporting that only four inmates out of 24 agreed to participate in a video arraignment test at Corcoran State Prison); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 840, at 3 (May 18, 1995) (stating that only one inmate at Pelican Bay State Prison consented to the video arraignment project).

¹³. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 840, at 4 (Apr. 18, 1995); see U.S. CONST. amend. VI (granting the defendant in a criminal trial the right to be informed of the nature of the charges as well as the opportunity to challenge witnesses and retain counsel); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 840, at 4 (Apr. 18, 1995) (quoting opposition to SB 840 put forth by California Attorneys for Criminal Justice); see also Valenzuela-Gonzalez v. United States, 915 F.2d 1276, 1280 (9th Cir. 1990) (holding that Federal Rules of Criminal Procedure require the physical presence of the defendant at the arraignment); Patricia Nealon, Public Counsel Agency Opposes 'Video' Court, BOSTON GLOBE, Feb. 20, 1993, at 24 (discussing a public defender group's opposition to video-arraignments). See generally Raburn-Remfry, supra note 11 (discussing the minimum standards that video production of the defendant must meet to pass constitutional muster).

¹⁴. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 840, at 3 (Apr. 25, 1995); see also Lederer, supra note 11, at 1106-07 (expressing concern as to whether an attorney can zealously defend a client if the attorney must decide between being present in the courtroom and separated from the client, or present with the client and absent from the courtroom where bargaining may take place). But see Saundra Torry, Courtrooms Boost Use of Video Camera Technology, WASH. POST, Sept. 20, 1993, at F7 (discussing how Dade County, Florida requires two attorneys: one present with the defendant and the other present in the courtroom).
Existing law mandates that a magistrate shall issue a warrant or summons for the arrest of a defendant upon the filing of a complaint, provided that two conditions are met. First, the complaint must indicate that the alleged offense has been committed. Second, the circumstances must provide a reasonable basis for believing that the defendant has committed the offense. Chapter 563 amends existing law by providing that a magistrate shall issue an arrest warrant only if the magistrate is satisfied that the two conditions exist.

Chapter 563 adds to existing law by enabling a magistrate to issue a warrant of probable cause for the arrest of the defendant upon a declaration of probable cause, rather than upon the filing of a criminal complaint. Moreover, Chapter 563

1. See CAL. PENAL CODE § 813(a) (amended by Chapter 563) (providing for the issuance of a summons, in lieu of an arrest warrant, upon the request of the prosecutor); see also id. § 813(b) (amended by Chapter 563) (requiring that a summons be similar in form to an arrest warrant and must contain specified elements, including but not limited to, the name of the defendant, the date and time the summons was issued, the offense charged, and the time and place for appearance); id. § 813(c) (amended by Chapter 563) (declaring that if a defendant has been properly served with a summons and fails to comply with its provisions, a bench warrant for arrest shall be issued); id. § 813(d) (amended by Chapter 563) (requiring that the defendant complete the booking process if he has not already done so); id. § 813(e) (amended by Chapter 563) (mandating that a summons may not be issued, if any of the following apply: (1) the offense charged involves violence, (2) the offense charged involves a firearm, (3) the offense charged involves resisting arrest; (4) there are one or more outstanding arrest warrants for the person; (5) the prosecution of the offense or offenses with which the person is charged, or the prosecution of any other offense would be jeopardized; (6) there is the possibility of continuing violations or that persons or property would be exposed to imminent danger; or (7) it is likely that the person would fail to comply with the provisions of the summons).

2. Id. § 813(a) (amended by Chapter 563); see People v. Ramey, 16 Cal. 3d 263, 265-66, 545 P.2d 1333, 1340-41, 127 Cal. Rptr. 629, 636-637 (1976) (holding that an arrest warrant must be obtained before the police may enter a suspect's home for the purpose of effecting an arrest); cf. ALA. CODE § 15-7-3 (1982) (stating that a judge may issue an arrest warrant if he is reasonably certain, upon examination of depositions taken at the time the complaint was filed, that the alleged offense has been committed by the named defendant); ARK. CODE ANN. § 16-81-104 (Michie 1987) (stating that if a magistrate believes that an offense has been committed, he may interview anyone he believes to have information regarding the offense, and subsequently issue an arrest warrant for the alleged offender); ILL. ANN. STAT. ch. 725, para. 5/107-9 (Smith-Hurd 1992) (providing for the issuance of an arrest warrant, upon the filing of a written complaint, as long as there exists probable cause to believe that an offense was committed by the named offender); IND. CODE ANN. § 35-33-2-1 (West 1986) (stating that a magistrate may not issue an arrest warrant unless an indictment has been found charging the suspect with the commission of an offense, or a judge determines that probable cause exists and an indictment is filed charging him with an offense); KAN. STAT. ANN. § 22-2302 (1988) (stating that an arrest warrant may be issued if the magistrate finds from the complaint, or from affidavits filed from the complaint, or from other evidence, that there exists probable cause that the particular crime was committed by the particular defendant); MONT. CODE ANN. § 46-6-201 (1993) (stating that an arrest warrant shall be issued if there appears from the contents of the complaint and the examination of witnesses, that a crime has been committed by the person designated in the complaint).

3. CAL. PENAL CODE § 813(a) (amended by Chapter 563).

4. Id.

5. Id.

6. Id. § 817(a)(1) (enacted by Chapter 563); see id. (providing that an arrest warrant shall be issued if, and only if, the magistrate is convinced that the stated offense was committed by the named defendant); see also id. § 817(a)(2) (enacted by Chapter 563) (stating that the complaint process set forth in California Penal Code § 813 may not be initiated by the issuance of a warrant of probable cause for arrest); id. (stating that the warrant of probable cause for arrest shall be bound by the same requirements that are applied to an arrest warrant issued pursuant to California Penal Code § 813, with respect to authority of service and time limitations); id. § 817(d) (enacted by Chapter 563) (permitting the magistrate to question, under oath, the person seeking the warrant and any available witnesses); id. (enabling the magistrate to obtain the written
requires that the declaration in support of the warrant of probable cause for arrest consist of a written, sworn statement. Alternatively, Chapter 563 permits an oral statement made under oath to substitute for a written declaration, if either of the following conditions exist: (1) The oath is taken under penalty of perjury, recorded, and transcribed; or (2) the oath is transmitted through telephone and facsimile equipment and such transmission conforms to specified requirements.

COMMENT

Under the provisions of the California Penal Code, a complaint may be used either to initiate criminal proceedings, or to demonstrate probable cause for arrest. Consequently, California courts have held that an arrest warrant can be...
issued if a complaint furnishes probable cause for arrest, even if that complaint is not used to institute criminal proceedings.¹⁰

Chapter 563 was enacted to codify the doctrine established by California courts that allows an arrest warrant to be issued without instituting a criminal action.¹¹ Moreover, Chapter 563 ensures that the relevant provisions of the Penal Code conform with constitutional standards by explicitly requiring that probable cause exist before an arrest warrant may be issued.¹²

Laura K. O’Connor

Criminal Procedure; criminal actions—pre-trial information

Penal Code § 1204.5 (amended).
AB 130 (Rainey); 1995 STAT. Ch. 86

Existing law, subject to certain exceptions, prohibits judges from reviewing the criminal record of a defendant, or any written reports concerning the offense of which the defendant is charged, before a plea has been entered.¹ Moreover,

¹. CAL. PENAL CODE § 1204.5 (amended by Chapter 86); see id. § 1204.5(a) (amended by Chapter 86) (stating that no judge may read the pre-sentence report before defendant has been found guilty or pled guilty except as provided in the rules of evidence applicable at trial, or with the defendant’s consent, or affidavits in connection with the issuance of a warrant or the hearing of any law and motion matter, or any matter relating to bail, or a petition for a writ); see also Gregg v. United States, 394 U.S. 489, 492 (1969) (concluding that to allow the judge, who will pronounce the defendant’s guilt or innocence or who will preside over the jury trial,

Selected 1995 Legislation 611
existing law lists well-defined exceptions to the prohibition on the use of the specified information, including, but not limited to, matters provided for in the rules of evidence applicable at trial and those pertaining to a proper pre-trial issue.2

Chapter 86 expands existing law by permitting a judge, who is not the preliminary hearing or trial judge in the case, to consider any information about the defendant for the purpose of that judge adopting a pre-trial sentencing position or disapproving a guilty plea entered pursuant to section 1192.5 of the California Penal Code,3 if certain conditions are met.4 First, Chapter 86 requires that the defendant be represented by counsel, unless he or she expressly waives the right to counsel.5 Second, Chapter 86 mandates that any information provided to the

to consider the presentence report before a verdict is rendered would seriously contravene the rule’s purpose of preventing possible prejudice; CeLillianne Green, District of Columbia Court of Appeals Project on Criminal Procedure: XI. Presentence Investigation, Sentencing, and Multiple Sentences, 26 How. L.J. 1168, 1170 (1993) (stating that the utility of the presentence report to the court is weighed against its utility to the defendant, thereby prohibiting a judge from reviewing the report before a guilty plea is entered or the defendant is convicted); cf. 28 U.S.C.A. § 455(b)(1) (West 1993) (requiring that a judge who has personal knowledge of disputed evidentiary facts concerning the proceeding must disqualify himself or herself); Fed. R. CRM. P. 32(b)(3) (stating that a presentence report must not be submitted to the court unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty); id. 32(b)(4)(A) (mandating that a presentence report must contain information about a defendant’s history and characteristics, including any prior criminal record). See generally John E. Gillick, Jr. & Robert E. Scott, Jr., The Presentence Report: An Empirical Study of Its Use in The Criminal Process, 58 GEO. L.J. 451 (1970) (discussing the role of the presentence report in federal criminal procedure).

2. CAL. PENAL CODE § 1204.5 (amended by Chapter 86); see also In re Walters, 15 Cal. 3d 738, 752 n.7, 543 P.2d 607, 617 n.7, 126 Cal. Rptr. 239, 249 n.7 (1975) (holding that a probable cause determination is in the nature of a “law and motion” matter within the meaning of California Penal Code § 1204.5); O’Neal v. Superior Court of Los Angeles County, 185 Cal. App. 3d 1086, 1094, 230 Cal. Rptr. 257, 262 (1986) (holding that the legislative history of California Penal Code § 1204.5 reveals that the section is intended to apply to magistrates as well as judges); id. at 1095, 230 Cal. Rptr. at 262 (holding that a judge who properly reviews a defendant’s record pursuant to a bail hearing is not thereafter disqualified from the case). But see Breedlove v. Municipal Court, 27 Cal. App. 4th 60, 64, 32 Cal. Rptr. 2d 400, 402 (1994) (construing California Penal Code § 1204.5 strictly to contain no implied exception that would allow a judge to consider pre-plea probation reports in forming a pre-trial position on a case at the pre-preliminary hearing conference, even when that judge would not be the trial judge).

3. See CAL. PENAL CODE § 1192.5 (West Supp. 1995) (outlining the specification of punishment and exercise of judicial powers available to the court, upon a plea of guilty or nolo contendere, as well as the relevant procedures concerning the approval and withdrawal of the plea).

4. CAL. PENAL CODE § 1204.5(b) (amended by Chapter 86); see CAL. PENAL CODE § 1192.5 (West Supp. 1995); see also United States v. Gallington, 488 F.2d 637, 640 (8th Cir. 1973) (holding that a judge who has rejected a guilty plea from an accused person after having read the presentence investigation report may preside over a criminal trial, before a jury, against that person), cert. denied, 416 U.S. 907 (1973). See generally Annotation, Propriety of Judge Presiding in Federal Criminal Case After Rejecting Accused’s Guilty Plea, 27 A.L.R. Fed. 589 (1976 & Supp. 1994) (analyzing the federal cases in which a judge has presided over a criminal case after he has rejected a guilty plea from the accused in the same case).

5. CAL. PENAL CODE § 1204.5(b)(1) (amended by Chapter 86); see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 130, at 2 (May 9, 1995) (stating that Chapter 86 avoids a potential constitutional conflict in that it allows a defendant who wishes to defend himself to avail himself of the pre-plea report if he expressly waives his right to counsel); see also U.S. CONST. amend. VI (guaranteeing a criminal defendant the assistance of counsel for his defense); U.S. CONST. amend. XIV (providing that no state may deprive a person of life, liberty, or property without due process of law); Faretta v. California, 422 U.S. 806, 819-20 (1975) (holding that the defendant’s right to self-representation is implied by the structure of the 6th amendment).
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judge must be provided to the prosecution and to the defense counsel five days prior to the hearing for the purpose of considering a proposed guilty plea or proposed sentence.6 Finally, Chapter 86 states that both defense counsel and the prosecution must be accorded the opportunity to provide information, either on or off the record, to supplement or rebut the information presented at the hearing.7

COMMENT

Prior to the enactment of Chapter 86, judges in the criminal calendar departments regularly utilized pre-plea probation reports in order to garner information about the defendant and the circumstances of the crime; this helped to ensure a fair pre-trial disposition offer.8 This practice fostered the resolution of cases at the earliest possible opportunity, thereby speeding up the flow of cases through the criminal justice system.9 Chapter 86 was enacted after the Public Defender’s office successfully challenged the calendar judges’ use of the pre-plea probation reports on the grounds that such a practice violated the express provisions of section 1204.5 of the California Penal Code.10 By creating a new exception to the provisions of California Penal Code section 1204.5, the Legislature hopes to encourage the efficient resolution of criminal cases, while

6. CAL. PENAL CODE § 1204.5(b)(2) (amended by Chapter 86); see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 130, at 2 (May 9, 1995) (suggesting that the additional judicial week added to the pre-plea report process may prejudice the prosecution by allowing more time for a case to become “cold” and by increasing the likelihood that witnesses will disappear before trial preparation begins).
7. CAL. PENAL CODE § 1204.5(b)(3) (amended by Chapter 86).
8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 130, at 1 (May 9, 1995); see id. (stating that pre-sentencing reports enable calendar department judges to make a meaningful disposition offer); see also Letter from Douglas E. Swager, Judge, Superior Court of the State of California, to Assemblymember Richard Rainey (June 10, 1994) (copy on file with the Pacific Law Journal) (declaring that Contra Costa County judges have utilized pre-plea probation reports in order to make an informed disposition offer).
9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 130, at 1 (May 9, 1995); see id. (stating that pre-sentence reports have become an essential part of trial court coordination plans); see also Letter from Douglas E. Swager, supra note 8 (declaring that the use of pre-plea probation reports furthers the efficient resolution of criminal cases).
10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 130, at 2 (Mar. 7, 1995); see Breedlove v. Municipal Court, 27 Cal. App. 4th 60, 65, 32 Cal. Rptr. 2d 400, 403 (1994) (striking down the use of pre-plea probation reports in pre-preliminary hearing conferences); see also id. (refusing to recognize an implied exception to the provisions of California Penal Code § 1204.5 for non-trial judges and declaring that any alteration to the section must be made by the Legislature).
preserving the section's purpose of protecting criminal defendants from possible prejudice.11

Laura K. O'Connor

Criminal Procedure; electronic surveillance

Penal Code §§ 629.50, 629.51, 629.52, 629.54, 629.56, 629.58, 629.60, 629.62, 629.64, 629.66, 629.68, 629.70, 629.72, 629.74, 629.76, 629.78, 629.80, 629.82, 629.84, 629.86, 629.88, 629.89, 629.90, 629.91, 629.92, 629.94, 629.96, 629.98 (new and repealed); §§ 629, 629.02, 629.06, 629.08, 629.10, 629.32, 629.38, 629.44, 629.48 (amended).

SB 1016 (Boatwright); 1995 STAT. Ch. 971

Existing law requires applications for orders permitting the interception of wire communications to be submitted in writing to a judge upon the personal oath or affirmation of the Attorney General, Chief Assistant Attorney, Criminal Law Division, or district attorney.1 Chapter 971 provides that such applications may also be submitted upon the personal oath or affirmation of the Chief Deputy Attorney General.2

Existing law provides that upon an application for an order permitting the interception of wire communications, a judge may enter an ex parte order authorizing such interception within the territorial jurisdiction of the court in which the judge is sitting when, among other things, probable cause exists to support the belief that an individual is committing, has committed, or is about to commit one of the specified offenses involving controlled substances, or is conspiring to commit such an offense.3 Chapter 971 expands the classification of offenses for

1. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 130, at 1 (May 9, 1995); see Letter from Douglas E. Swager, supra note 8 (stating that California Penal Code § 1204.5 was never intended to apply to judges who would be the trier of fact); see also Letter from Harold F. Bradford, Assistant Legislative Representative, to Governor Ronald Reagan (Aug. 3, 1968) (copy on file with the Pacific Law Journal) (stating that the purpose of California Penal Code § 1204.5 was to prevent the trial judge from considering information regarding the accused's prior criminal record that could possibly prejudice the judge's views during the course of the trial).

11. CAL. PENAL CODE § 629 (amended by Chapter 971); see id. (specifying that the application must be made to the presiding judge of the superior court or one other judge designated by the presiding judge); id. (requiring applications to include specified information, such as the identity of the law enforcement officer making the application, and stating that the judge may require the applicant to furnish testimony or documentary evidence in addition to the listed requirements).

2. Id.

3. Id. § 629.02(a) (amended by Chapter 971); see id. (specifying that a judge, entering an ex parte order authorizing the interception of wire communications, may enter the order as requested or may modify it); id. (stating that a judge may authorize the interception of wire communications only if the judge determines,
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which an order authorizing the interception of wire communications may be obtained.\textsuperscript{4} If all of the conditions of California Penal Code section 629.02 are met, such an order may now be issued when there is probable cause to support the belief that a person is committing, has committed, or is about to commit murder, solicitation to commit murder, a crime involving the bombing of public or private property, aggravated kidnaping, or conspiracy to commit any these crimes.\textsuperscript{5} Chapter 971 emphasizes that an order to intercept wire communications may be entered where all of the specified conditions are met, and there is probable cause to believe that the communications to be intercepted may be used for locating or rescuing a kidnap victim.\textsuperscript{6}

Under existing law, a judge may grant oral approval of an informal application, by the Attorney General, Chief Assistant Attorney General, Criminal Law Division, or a district attorney, for the interception of wire communications \textit{without entering an order}, if the judge determines that all of the conditions specified by statute are met.\textsuperscript{7} Chapter 971 adds that a judge may also grant oral

\footnotesize{\textsuperscript{4} \textit{Id.} \textsuperscript{629.02(a)-(d) are present}; see also \textit{id.} \textsuperscript{629.02(a)} (amended by Chapter 971) (stating that the judge must determine that there is probable cause to support the belief that an individual is committing, has committed, or is about to commit one of the following offenses: (1) importation, possession for sale, transportation, manufacture, or sale of controlled substances in violation of Health and Safety Code §§ 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, or 11379.6 with respect to a substance containing heroin, cocaine, PCP, methamphetamine, or their analogs where the substance exceeds 10 gallons by liquid volume or three pounds of solid substance by weight; or (2) conspiracy to commit any of the aforementioned crimes); \textit{id.} \textsuperscript{629.02(b)} (amended by Chapter 971) (stating that in order to authorize an interception of wire communications, the judge must find that probable cause exists to support the belief that particular communications concerning the illegal activities will be obtained through that interception); \textit{id.} \textsuperscript{629.02(c)} (amended by Chapter 971) (directing that the judge must find probable cause to believe that the facilities which are subject to interception of wire communications: (1) are being used, or are about to be used in connection with the commission of the offense; or (2) are leased to, listed in the name of, or commonly used by the person making such communications); \textit{id.} \textsuperscript{629.02(d)} (amended by Chapter 971) (requiring the judge entering the order to determine that normal investigative procedures have failed or reasonably appear to be unlikely to succeed or too dangerous).}

\footnotesize{\textsuperscript{5} \textit{Id.} \textsuperscript{629.02(a)(2), (3), (c) (amended by Chapter 971).}}

\footnotesize{\textsuperscript{6} \textit{Id.} \textsuperscript{629.02(c) (amended by Chapter 971); see infra notes 39-40 and accompanying text (noting that Penal Code \textsuperscript{629.02(c), as amended by Chapter 971, emphasizes that orders may be entered to intercept communications if there is probable cause to believe the communications may be used for locating or rescuing a kidnap victim, but that \textsuperscript{629.52(c), as enacted by Chapter 971, does not provide this emphasis).}}}

\footnotesize{\textsuperscript{7} \textit{Id.} \textsuperscript{629.06(a) (amended by Chapter 971); see \textit{id.} (stating that oral approval for an interception, may be granted without an order, if there is a determination of the following: (1) There are grounds upon which an order could be issued under California Penal Code §§ 629-629.48, (2) there is probable cause to believe that an emergency situation exists with respect to the investigation of an offense enumerated in California Penal Code §§ 629-629.48, and (3) there is probable cause to believe that a substantial danger to life or limb exists justifying the authorization for immediate interception of a private wire communication before an application for an order could be submitted and acted upon with due diligence); see also \textit{id.} \textsuperscript{629.06(b) (amended by Chapter 971) (requiring that approval for an informal application for a wire interception be conditioned upon filing with the judge, within 48 hours of the oral approval, a written application for an order which must also recite the oral approval and be retroactive to the time of the oral approval).}}
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approval of such an application when made by the Chief Deputy Attorney General, subject to all of the same conditions.\(^8\)

Under existing law, each order that authorizes the interception of a wire communication may provide such authorization for a period only as long as is necessary to achieve the objective of the authorization, and that time period may not in any event exceed 30 days.\(^9\) Extensions may be granted only in specified circumstances.\(^{10}\) Additionally, existing law provides that each order or extension issued must contain provisions stating that the authorization to intercept communications must be executed as soon as practicable, that interception of communications that are not authorized to be intercepted must be minimized, and that the authorization terminates upon attainment of the authorized objective, or at the time for termination designated in the order or any extensions.\(^{11}\) Chapter 971 provides that when an intercepted communication is in a foreign language, an interpreter of that foreign language may assist peace officers in intercepting the communication, as long as the interpreter has the same training as other persons authorized to intercept communications under Penal Code sections 629 through 629.48, and the interception of communications that are not authorized to be intercepted are minimized.\(^{12}\)

Existing law requires that reports be made to the judge who issued the order for the wire interception.\(^{13}\) The reports must indicate the progress that has been made toward the attainment of the authorized objective of the order permitting the interception, or they must evince a satisfactory excuse for the lack of progress and must state the need for continued authorization for interception.\(^{14}\) The reports must be made in conformance with any intervals that the judge may specify, but, at a minimum, they must be made at least every 72 hours.\(^{15}\)

Existing law provides guidelines regulating the use and disclosure of intercepted communications relating to crimes that are not specifically mentioned in the order of authorization.\(^{16}\) Under existing law, if an officer intercepts communications relating to a crime that is not specified in the order of authorization, but the crime is one of the designated crimes for which an order authorizing inter-

\(^8\) Id. § 629.06(a) (amended by Chapter 971).
\(^9\) Id. § 629.08 (amended by Chapter 971).
\(^10\) Id.; see id. (specifying that extensions may be granted only upon an application made in accordance with Penal Code § 629, and upon the court making findings as required therein); id. (stating that the period of extension may be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted, and in no event may the time be any longer than 30 days).
\(^11\) Id. § 629.08 (amended by Chapter 971).
\(^12\) Id.
\(^13\) Id. § 629.10 (amended by Chapter 971); see id. (allowing the report to be in writing or by any reasonable or reliable means).
\(^14\) Id.; see id. (requiring a judge to terminate the order allowing interception of wire communications if the judge finds that progress has not been made, that there is no satisfactory explanation for the lack of progress, or no need exists for continuing the interception).
\(^15\) Id.
\(^16\) Id. § 629.32 (amended by Chapter 971).
ceptions may be obtained, the contents of the interception, and any evidence derived therefrom, may be used or disclosed as provided in California Penal Code sections 629.24 and 629.26, and as provided in section 629.28 when authorized by a judge.

Under prior law, if the intercepted communications related to a crime that was not specified in the order of authorization, and the crime was not one for which an order authorizing the interception of communications could not be obtained, the contents of the interception, and any evidence derived therefrom, could not be used or disclosed pursuant to Penal Code sections 629.24 or 629.26, except to prevent the commission of a public offense, and could not be used or disclosed pursuant to section 629.28 unless certain conditions had been met.

Chapter 971 leaves section 629.32(a) intact, but amends section 629.32(b) to provide that if intercepted communications relate to crimes that are not specified in the order of authorization, they may not be used or disclosed pursuant to Penal Code sections 629.24 or 629.26, except to prevent the commission of a public offense, and may not be used or disclosed pursuant to section 629.28 unless certain conditions have been met.

The amendment causes uncertainty in the application of sections 629.32(a) and 629.32(b). For example, if an officer were to intercept communications relating to an offense that is not specified in the order of authorization, but which is a crime for which orders authorizing the interception of communications may be obtained, it is unclear under Chapter 971 whether section 629.32(a) or section 629.32(b) should be applied. Both sections state that they should be applied to situations in which the communications relate to an offense not specified in the court order. If section 629.32(b) is applied, the contents of the communication, and any evidence derived therefrom, may not be used or disclosed. If section 629.32(a) is applied, the contents of the communication, and any evidence

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17. Orders authorizing the interception of communications may be obtained for only those crimes specified in California Penal Code § 629.02(a).
18. CAL. PENAL CODE § 629.32(a) (amended by Chapter 971).
19. 1988 Cal. Stat. ch. 1373, sec. 1, at 4614 (enacting CAL. PENAL CODE § 629.32(b)); see id. (allowing use or disclosure as provided in California Penal Code §§ 629.24 and 629.26, and as provided in California Penal Code § 629.28 when authorized by a judge).
20. Compare 1988 Cal. Stat. ch. 1373, sec. 1, at 4614 (enacting CAL. PENAL CODE § 629.32(b)) (providing that if the intercepted communications relate to a crime not specified in the authorization order, and the crime they relate to is not one for which an order to intercept communications may be obtained, the contents may not be used or disclosed except as provided) with CAL. PENAL CODE § 629.32 (amended by Chapter 971) (providing that if the intercepted communications relate to a crime that is not specified in the order, the contents may not be used except as provided).
21. CAL. PENAL CODE § 629.32(a), (b) (amended by Chapter 921).
22. Id. § 629.32(b) (amended by Chapter 971); see id. (specifying the circumstances under which the contents of the communications that are intercepted, and evidence derived therefrom, may and may not be used); see also supra note 21 and accompanying text.
derived therefrom, \textit{may be used or disclosed}. This inconsistency created by Chapter 971 can be resolved only by reading in the language that it deleted.

Existing law provides protection for communications traveling via wire, line, cable, or instrument. Under existing law, this protection may not be construed so as to prohibit peace officers from intercepting wire communications pursuant to a court-authorized order, nor may it be construed as rendering inadmissible evidence obtained pursuant to a properly authorized court order. Under existing law, protection is also provided for communications by cellular and cordless phones, and provided to prohibit eavesdropping on, or the recording of, confidential communications. Chapter 971 places the same limits on protection for these types of communications as those limits existing law already places on the protection for wire communications.

Existing law requires the Attorney General to set certification standards for investigative or law enforcement officers. Upon meeting the minimum standards, the officers become eligible to apply for an order authorizing the interception of wire communications, to conduct the interceptions, and to use the

\begin{itemize}
\item \textsc{23. \textsc{Cal. Penal Code} \S 629.32(a) (amended by Chapter 971); see id. (specifying the circumstances under which the contents of the communications that are intercepted, and the evidence derived therefrom, may be used); see also supra notes 18-19 and accompanying text.}
\item \textsc{24. In reading in the deleted language, it becomes clear that when the intercepted communications relate to crimes for which orders authorizing the interception of communications may be obtained, section 629.32(a) should be applied, and when the communications relate to crimes for which orders authorizing the interception of communications may not be obtained, section 629.32(b) should be applied. See Telephone Interview with Gene Wong, Chief Council, Senate Judiciary Committee (Nov. 21, 1995) (notes on file with the Pacific Law Journal) (commenting that the change to California Penal Code \S 629.32 is only a technical amendment which is not likely to cause any problems); id. (explaining that the statute should be read as a whole; \textquotedblleft subsection (b) cannot be read without reading subsection (a)\textquotedblright).}
\item \textsc{25. \textsc{Cal. Penal Code} \S 631 (West Supp. 1995); see id. (listing prohibited acts, prescribing punishment, addressing recidivists, providing exceptions, and regulating admissibility of evidence); see also id. \S 630 (West 1988) (declaring that the Legislature intends for California Penal Code \S\S 630-637.6 to protect the right of privacy of the people of the State of California).}
\item \textsc{26. Id. \S 629.38 (amended by Chapter 971).}
\item \textsc{27. Id. \S\S 632, 632.5, 632.6, 632.7 (West Supp. 1995); see id. \S 632(a) (West Supp. 1995) (providing punishment for every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio); id. \S 632.5(a) (West Supp. 1990) (providing punishment for every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone); id. \S 632.6(a) (West Supp. 1995) (providing punishment for every person who, maliciously and without the consent of all parties to the communication, intercepts or receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cordless telephone and a landline telephone, or between a cordless telephone and a cellular telephone); id. \S 632.7(a) (West Supp. 1995) (providing punishment for every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone).}
\item \textsc{28. Id. \S 629.38 (amended by Chapter 971); see supra note 25-27 and accompanying text.}
\item \textsc{29. \textsc{Cal. Penal Code} \S 629.44(b)(1) (amended by Chapter 971).}
\end{itemize}
Criminal Procedure communications, or evidence derived therefrom, in official proceedings.\(^{30}\) Chapter 971 requires that the Attorney General is to set certification standards for other persons when it is necessary to provide linguistic interpretation of communication interceptions.\(^{31}\) The interpreters may be designated by the Attorney General, Chief Deputy Attorney General, Chief Assistant Attorney General, Criminal Law Division, or the district attorney, and they are to be supervised by an investigative or law enforcement officer.\(^{32}\)

Chapter 971 suspends the operation of Penal Code sections 629 through 629.48 for a two-year period, beginning on January 1, 1996 and ending on December 31, 1997.\(^{33}\) During the time when these provisions are suspended, Chapter 971 enacts a new chapter, which will instead be operative.\(^{34}\) On January 1, 1998, this new chapter will be repealed, and sections 629 through 629.48 will again become operative.\(^{35}\) Existing law provides that California Penal Code sections 629 through 629.48 will sunset on January 1, 1999, at which time they are repealed.\(^{36}\)

The description of the changes made by Chapter 971 up until this point has described the changes that Chapter 971 makes to Penal Code sections 629 through 629.48, which are to be suspended for two years before becoming operative again in 1998. The new sections enacted by Chapter 971 contain exactly the same provisions, with the same amendments, as those sections which Chapter 971 suspends, with four exceptions.

First, instead of applying only to wire communications, Penal Code sections 629.50 through 629.98 apply to electronic digital pager, electronic cellular telephone, and wire communications.\(^{37}\) Second, definitions are provided for terms that appear in Penal Code sections 629.50 through 629.98, but not in sections 629 through 629.48.\(^{38}\) Third, Chapter 971 includes a sentence in Penal Code section 629.02(c) emphasizing that communications may be intercepted if used for locating or rescuing a kidnap victim.\(^{39}\) Although it may be only a technical difference, this sentence was not included in Penal Code section 629.52.\(^{40}\) Finally, section 629.38 was amended to include Penal Code sections 632, 632.5, 632.6,
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Section 629.88, as enacted, includes only sections 631, 632.5, 632.6, and 632.7. The California Attorney General sponsored Chapter 971. The Attorney General’s office asserts that digital pagers are the most common form of electronic communication and that their use is prevalent among drug dealers. The provisions of Chapter 971 will help narcotics officers enforce the law, as criminals will no longer have a technological advantage over law enforcement officials. Additionally, in expanding California’s wiretap law to include crimes other than drug related offenses, Chapter 971 will better enable law enforcement officials to protect citizens. Supporters of Chapter 971 assert that the interception of digital pagers is less of an intrusion than a wiretap because only telephone numbers are intercepted and not statements.

Opponents of Chapter 971 argue against the expansion of the wiretap laws, asserting that the new law gives law enforcement officers expanded authority to intrude into peoples’ private lives. Opponents protest both the expansion to cover additional crimes and the expansion to cover additional forms of communications.

In enacting title III of the Omnibus Crime Control and Safe Streets Act, Congress did not intend to preempt the field of wiretap legislation, but rather, it

41. Id. § 629.38 (amended by Chapter 971); see supra notes 25-28 and accompanying text (describing protections provided to citizens of California, and limits on those protections).
42. CAL. PENAL CODE § 629.88 (enacted by Chapter 971); see supra notes 25-28 and accompanying text (describing protections provided to citizens of California, and the limits on the protections). Compare CAL. PENAL CODE § 629.38 (amended by Chapter 971) (applying to wire communications and specifying that the protections provided for in California Penal Code §§ 632, 632.5, 632.6, and 632.7 may not be construed so as to prohibit any peace officer from intercepting any wire communications pursuant to an authorized court order, and may not be construed so as to render inadmissible any evidence obtained pursuant to an authorized court order) with id. § 629.88 (enacted by Chapter 971) (applying to wire, electronic digital pager, and electronic cellular telephone communications and specifying that the protections provided for in California Penal Code §§ 632.5, 632.6, and 632.7 may not be construed so as to prohibit any peace officer from intercepting any wire, electronic digital pager, or electronic cellular phone communications pursuant to an authorized court order, and may not be construed so as to render inadmissible any evidence obtained pursuant to an authorized court order).
43. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1016, at 3 (July 6, 1995); see id. (listing supporters of SB 1016, as of July 5, 1995, as including, California Peace Officers’ Association, California Police Chiefs’ Association, California District Attorneys’ Association, and the Los Angeles County Sheriff, among others).
44. Id.
45. Id.; ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1016, at 2 (July 29, 1995).
46. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1016, at 2 (July 29, 1995).
47. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1016, at 3 (July 6, 1995).
49. Id.
intended to allow states to enact legislation in this area as long as state laws are not more permissive than the federal scheme.\textsuperscript{51}

In interpreting the provisions of title III, the United States Supreme Court has held that "[e]xcept as expressly authorized in title III . . . all interceptions of wire and oral communications are flatly prohibited."\textsuperscript{52}

Chapter 971 expands existing law by including additional crimes for which orders may be sought to intercept communications.\textsuperscript{53} Some of the additional crimes, solicitation to commit murder, and the commission of a crime involving the bombing of public or private property, and conspiracy to commit those crimes, are not expressly mentioned in the federal statute, and may therefore, face constitutional challenges.\textsuperscript{54}

\textsuperscript{51} See State v. Thompson, 464 A.2d 799, 807 (Conn. 1983) (explaining that while the federal standard regulating electronic surveillance establishes minimum guidelines, states may enact more restrictive legislation, and state courts may interpret such legislation to afford its own citizens greater protection than is provided for by federal law), cert. denied, 465 U.S. 1006 (1984); Halpin v. Superior Court of San Bernardino County, 6 Cal. 3d 885, 898-99; 495 P.2d 1295, 1304; 101 Cal. Rptr. 375, 384-85 (1972) (concluding that Congress intended to enact comprehensive legislation establishing minimum standards against which state regulations are to be measured, and that Congress left room for the states to supplement the federal legislation, provided that state regulations are not more permissive that federal law), cert. denied, 409 U.S. 982, and overruled on other grounds by People v. Valenzuela, 151 Cal. App. 3d 180, 198 Cal. Rptr. 469 (1984); People v. Shapiro 409 N.E.2d 897, 906 (N.Y. 1980) (explaining that a state law that exceeds the boundaries of federal law violates the supremacy clause); People v. Stevens, 34 Cal. App. 4th 56, 61, 40 Cal. Rptr. 2d 92, 95 (1995) (citing People v. Conklin, 12 Cal. App. 3d 259, 522 P.2d 1057, 114 Cal. Rptr. 241 (1974), and Halpin, 6 Cal. 3d at 898-99; 495 P.2d at 1304, 101 Cal. Rptr. at 384, and stating that the Omnibus Crime Control and Safe Streets Act does not preempt states from enacting wiretap legislation, as long as state legislation is not more permissive than the federal statutes), review denied, No. H012456, 1995 Cal. LEXIS 4603, at 1 (Cal. July 20, 1995); see also U.S. CoNsT. art. VI, cl. 2 (declaring that all law made under the authority of the United States federal government shall be the supreme law of the land).

\textsuperscript{52} Gelbard v. United States, 408 U.S. 106 (1972).

\textsuperscript{53} CAL PENAL CODE § 629.02(a)(2) (amended by Chapter 971); id. § 629.52(a)(2) (enacted by Chapter 971); see id. § 629.02(a)(2) (amended by Chapter 971) (providing that a judge may enter an order authorizing the interception of communications for the offenses of murder, solicitation to commit murder, the commission of a crime involving the bombing of a public or private property, or aggravated kidnapping); id. § 629.52(a)(2) (enacted by Chapter 971) (providing that a judge may enter an order authorizing the interception of communications for the offenses of murder, solicitation to commit murder, the commission of a crime involving the bombing of a public or private property, or aggravated kidnapping).

\textsuperscript{54} Compare 18 U.S.C.A. § 2516(2) (West Supp. 1995) (providing that a state court judge may enter an order authorizing state law enforcement officials to intercept wire, oral, or electronic communications when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable state statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses) with CAL PENAL CODE § 629.02(a) (amended by Chapter 971) (permitting a judge to issue an order to authorize the interception of communications when there is probable cause to believe that an individual is committing, has committed, or is about to commit, one of the following offenses: (1) importation, possession for sale, transportation, manufacture, or sale of controlled substances in violation of Health and Safety Code §§ 113151, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6 with respect to a substance containing heroin, cocaine, PCP, methamphetamine, or their analogs where the substance exceeds 10 gallons by liquid volume or three pound of solid substance by weight; (2) murder, solicitation to commit murder, the commission of a crime involving the bombing of public or private property, aggravated kidnapping; and (3) conspiracy to commit any of the above-mentioned crimes) and id. § 629.52(a)(2) (enacted by Chapter 971) (listing the same crimes as those listed in California Penal Code § 629.02).
In People v. Shapiro, the Court of Appeals of the State of New York held that to the extent that a New York statute was interpreted to authorize wiretapping for the investigation of prostitution and sexual abuse where there was no evidence of force or violence, and the crimes were not dangerous to life or limb, it contravened federal wiretap law. Since the crimes for which the order authorizing the interception of communications in Shapiro were not specifically enumerated in the federal statute, the court inquired as to whether the crimes were of such a nature as to be included under the federal statute as “other crime[s] dangerous to life [or] limb.”

In citing legislative history, the court found that the drafters of title III devised the list of enumerated crimes for which orders may be issued to intercept wire communications to include offenses that are either “intrinsically serious” or “characteristic of the operations of organized crime.” It reasoned that the ejusdem generis rule requires the phrase “or other crime dangerous to life [or] limb” to be interpreted as applying to only those crimes of the same kind as those actually enumerated in the list preceding the phrase, and the court stated that a narrow interpretation of the federal statute “is in harmony” with the court’s view of the dangers inherent in allowing eavesdropping.

The court concluded that the crimes of sexual abuse and the promotion of prostitution do not come within the intendment of the Federal statute because they cannot be said to be “crime[s] dangerous to life [or] limb.” The court’s conclusion is based on two lines of reasoning. First, the criminal activities for which wiretaps in Shapiro were authorized involved only consensual conduct. Legislative history evinces Congress’ intent that the scope of permissible wiretapping should not be expanded to include consensual activities. Second, the crimes did not involve the type of danger for which Congress permits orders authorizing the interception of communications. The court stated that the standard of danger should not be expanded to include “more subtle forms of

55. 409 N.E.2d 897 (N.Y. 1980).
56. Shapiro, 409 N.E.2d at 907-08; see id. at 908 (holding that an order authorizing the interception of wire communications, in an investigation of allegations of the promotion of prostitution and sexual abuse, is invalid, and the evidence obtained through those interceptions should have been suppressed).
57. Id. at 907-08.
58. Id. at 907 (citing S. REP. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2234); id. (explaining that the designated crimes, with the exception of gambling and bribery, “all involve harm or the substantial threat of harm to the person”).
59. Id. at 907.
60. Id.
61. Id.; see id. (noting that the facts of the case did not involve any violence or coercion).
62. Id.; see S. REP. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2187 (indicating legislative intent to exclude consensual crimes, such as fornication and adultery).
63. Shapiro, 409 N.E.2d at 907-08.
personal injury," such as psychological harm that minors may suffer as a result of being involved in the crimes.64

This issue was addressed in United States v. Millstone Enterprises.65 In following the reasoning of Shapiro, the court in Millstone found that Congress did not intend for prostitution to be a crime within the reach of permissible exercises of wiretapping, particularly where, as in Millstone, there were no indications of violence.66

The courts in Shapiro and Millstone left open the possibility of permitting the authorization of wiretaps in the future for the crimes of sexual abuse and prostitution, reasoning that if “similar acts are undertaken by force” or there are “indications of violence,” wiretapping could “be authorized in conformance with the supervening Federal standard.”67

In People v. Principe,68 the New York Court of Appeals held that a state court order authorizing the interception of communications for forgery, larceny, and related offenses was within the boundaries of what the federal statute defined as permissible areas for wiretapping where the facts established the existence of a pervasive, well-organized criminal operation, involving corrupt conduct by public employees.69 The New York Court of Appeals’ reasoning in Principe departed somewhat from its reasoning in Shapiro, decided just five years earlier. In Principe, the court concluded that by the “use of the singular in the ’catch all’ phrase ’or other crime dangerous to life, limb, or property’ Congress intended the word ’crime’ to be construed generically and did not seek to unreasonably limit the power of the State Legislature to enact enabling legislation.”70 The Principe court abandoned the narrow interpretation followed by the Shapiro court which applied the ejusdem generis rule which requires general language in a statute following a specifically enumerated list to be interpreted as applying only to those

64. Id. at 908; see id. at 907 (stating that just because state law declared that minors under the age of 17 are “incapable of consent,” that “does not catapult these criminal acts into the status of ‘crime[s] dangerous to life or limb’”); id. at 907-08 (stating that a decision of the Legislature of the State of New York declaring the acts to be dangerous to life or limb could not override the judgement of Congress).
66. See id. at 872 (holding that since state wiretap statutes “may narrow the scope of permissible state wiretapping, but may not permit state and local authorities to intercept . . . communications forbidden by federal law,” the state statute authorizing wiretapping for investigations of prostitution was invalid).
67. See Shapiro, 409 N.E.2d at 907 (noting that there were no indications of violence or force in the facts of the case, and the conduct was consensual); Millstone, 684 F. Supp. at 872 (holding that to the extent that the Pennsylvania statute authorized wiretap orders for nonviolent prostitution, the Pennsylvania wiretap statute contravenes the federal wiretap statute); see also People v. Winograd 480 N.Y.S.2d 419, 422-23 (N.Y. Crim. Ct. 1984) (citing to Shapiro, 409 N.E.2d at 908, and stating that the Shapiro court found that there may be circumstances under which sexual abuse, “could be used ‘in conformance with the supervening Federal standard,’” such as when undertaken by force), aff’d 494 N.Y.S.2d 593, and rev’d on other grounds, 509 N.Y.S.2d 512.
68. 478 N.E.2d 979 (N.Y. 1985).
69. Id. at 980, 982.
70. Id. at 982.
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In People v. Winograd, the New York Court of Appeals, found that usury is an offense that may be included among the crimes for which wiretaps may be used. Citing Principe, the Court of Appeals held that where there is evidence that a defendant is involved in a well-organized criminal operation and commits offenses that are intrinsically serious and characteristic of the operations of organized crime, the federal statute governing wiretapping enables the State to designate usury as a crime for which law enforcement officials may obtain authorized wiretap orders.

Since solicitation to commit murder and the commission of crimes involving the bombing of public or private property are not among those specifically enumerated in the federal statute, the crimes added by Chapter 971 must be interpreted as falling within the purview of the federal statute as "other crime[s] dangerous to life, limb, or property," to avoid being declared invalid.

If the courts in California follow the reasoning of Principe, and view the federal statute as enabling legislation, the courts would inquire as to whether the offenses added by Chapter 971 are "intrinsically serious" or "characteristic of the operations of organized crime," in determining whether the statute is valid. Arguably, the offenses added by Chapter 971 are at least as intrinsically serious as forgery, larceny, possession of stolen property, and usury, the crimes found to be included within the meaning of other crime[s] dangerous to life, limb, or property in the Shapiro, Principe, and Winograd decisions. Additionally,

71. Compare Principe, 478 N.E.2d at 982 (interpreting the word crime in title 18 of the United States Code § 2516(2) to be very broad) with Shapiro, 409 N.E.2d at 907 (emphasizing a narrow reading of the statute, and utilizing the ejusdem generis rule to limit the types of crimes which could come under it).
73. Winograd, 502 N.E.2d at 193.
74. Id. at 192-93. The trial court in Winograd focused on Congress' expressed intent to combat organized crime, and the court held that the possession of stolen property is a crime for which an order authorizing the interception of communications may be obtained. Id. See id., 502 N.E.2d at 193 (justifying the holding by reasoning that the "existence of a criminal organization" which receives stolen property "over a considerable period of time" from "numerous sources" constitutes a crime that is dangerous to... property).
75. See supra note 52 and accompanying text.
76. See Principe, 478 N.E.2d at 980, 982 (finding that forgery, larceny, and related crimes meet the test, as they are "intrinsically serious or [are] characteristic of the operations of organized crime," and are therefore included within the permissible scope of eavesdropping).
77. See supra note 76 (discussing the crimes which the Principe court included within the meaning of the federal statute); supra note 74 (finding possession of stolen property to be a crime for which wiretap orders may be authorized); supra note 73 and accompanying text (holding that courts may authorize orders to intercept communications for the offense of usury); see also Peter Benesh, The Booming Business of Terrorism, Pittsburgh Post-Gazette, Sept. 24, 1995, at A1 (reporting that 169 people were killed and 600 people were injured in April of 1995 when a federal building in Oklahoma City was destroyed by a bomb); id. (stating that six people were killed and over 1000 were injured in the 1993 bombing of the World Trade Center in New York City); id. (reporting that 270 people died in 1988 when Pan Am flight 103 was destroyed by a bomb over Lockerbie, Scotland); id. (describing a bombing which killed 241 United States Marines that were sent to Beirut, Lebanon in 1983); William Carley, A Time to Heal: Unabomber's Package Leaves Decade of Pain and Shattered Dreams, WALL St. J., Oct. 17, 1995, at A1 (reporting that three people have been killed, and 23 injured, as a result of the Unabomber's planting or mailing of 15 bombs over a 17 year period); Unabomber
bombings have been associated with the operations of organized crime.\textsuperscript{78}

If the courts in California adopt the narrow interpretation of the federal statute as applied by the Shapiro court, they would ask the same initial question, but also require the offense to be \textit{of the same kind} as those enumerated in the statute. It is difficult to predict how a court would rule in applying the Shapiro decision. On the one hand, conspiracy to commit solicitation to commit murder is fairly far removed from the types of crimes listed in the federal statute. On the other hand, in applying the lines of reasoning the court used in deciding Shapiro, the crimes added by Chapter 971 are likely to be upheld. In Shapiro, the court refused to allow the interception of communications for the crimes of prostitution and sexual abuse based on the reasoning that the crimes were consensual, and therefore outside the scope of the crimes for which Congress intended to permit wiretapping, and that the crimes involved only "subtle forms of personal injury," such as possible psychological harm.\textsuperscript{79} Neither solicitation to commit murder, nor the commission of a crime involving the bombing of public or private property are consensual crimes. Further, the type of injury involved in such crimes will likely be more than just psychological distress.\textsuperscript{80}

Rather than following rules applied by other state courts,\textsuperscript{81} California courts could develop their own standard based on their findings of Congressional intent. Congress' purpose, in enacting title III, was to "protect the privacy of . . . communications," and to delineate "on a uniform basis the circumstances and conditions under which the interception of . . . communications may be authorized."\textsuperscript{82} Congressional legislative history states that title III, in protecting privacy, prohibits surveillance unless for "the investigation or prevention of \textit{specified} types of \textit{serious} crimes." (emphasis added).\textsuperscript{83} It is arguable that Congress did not intend \textit{solicitation to commit murder}, or \textit{conspiracy to commit solicitation to commit murder} to be included among those "\textit{specified types of serious crimes}" that constitute "\it{other crime[s]} \textit{dangerous to life, limb, or property}.\textsuperscript{84} Further, in allowing states to enact legislation permitting law enforcement officials to survey communications that do not clearly fall within these

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\textsuperscript{78} See Benesh, supra note 77 (describing the startling growth of terrorist organizations from 1968 through 1993); id. (listing various bombings for which terrorist groups are responsible).

\textsuperscript{79} See supra notes 55-64 and accompanying text (discussing the court's analysis in Shapiro, 409 N.E.2d 897, 907-08).

\textsuperscript{80} See supra note 77 (describing injuries and fatalities resulting from various bomb attacks).

\textsuperscript{81} The decisions previously cited are persuasive authority only. California courts, of course, are not bound to follow the decisions of the New York and Arizona courts.


\textsuperscript{83} Id.

\textsuperscript{84} These offenses are not necessarily \textit{characteristic of the operations of organized crime}, and a \textit{mere} solicitation, or a \textit{mere} conspiracy to commit solicitation to commit murder is not necessarily \textit{intrinsically serious} or \textit{dangerous to life, limb, or property}. 
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categories, it is arguable that the expressed intent of Congress "to define on a uniform basis the circumstances and conditions under which the interception of communications may be authorized," is frustrated.85

Even if the crimes added by Chapter 971 are found to constitute other crime[s] dangerous to life, limb, or property, and are therefore found to be within the purview of the federal statute, it is not clear that the crimes added by Chapter 971 will be upheld. Even if California courts uphold the legislation on grounds that it does not exceed the boundaries set by federal statute, the legislation could still be challenged on the ground that it violates the Fourth Amendment.86 "[T]he fact that . . . legislation is necessary and the fact that Congress attempted to comply with the Supreme Court's rulings does not mean that the statute is constitutional. . . ."87

Angela M. Burdine

Criminal Procedure; identification by use of thumbprints

Penal Code §§ 853.5, 853.6 (amended); Vehicle Code §§ 40500, 40504 (amended).
AB 219 (Baca); 1995 STAT. Ch. 93

Under existing law, when a person is arrested for an infraction,1 the person may be released after providing satisfactory identification and signing a promise

86. See U.S. CONST. amend. IV (stating that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure may not be violated, and that warrants may be issued only upon probable cause).
87. United States v. Bobo, 477 F.2d 974, 980 (2d Cir. 1973), cert. denied, 421 U.S. 909 (1973); see id. at 979 (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967), and asserting that the purpose of the Fourth Amendment is to protect individuals from arbitrary invasions by government officials); Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 361 (1967), in his explanation that the Fourth "Amendment does not protect the merely subjective expectation of privacy, but also those 'expectation[s] that society is prepared to recognize as reasonable'").

1. See CAL. PENAL CODE § 17(d) (West Supp. 1995) (defining an "infraction" as every other crime or public offense that is not a felony or a misdemeanor); 1 B.E. WITTEN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, Introduction to Crimes § 74 (2d ed. 1988) (explaining that the category of infractions was created in 1968 to cope with petty offenses, such as minor traffic violations which are not punishable by imprisonment); id. § 80 (2d ed. 1988 & Supp. 1995) (specifying the differences between misdemeanors and infractions as the following: (1) a person charged with an infraction does not have a jury trial right; (2) a defendant charged with an infraction is not entitled to a public defender or other counsel at public expense, unless he remains in custody after being arrested; (3) court commissioners and hearing officers may hear infractions; however, all provisions of the law relating to misdemeanors apply to infractions, with exceptions as provided by law).
to appear. Existing law also provides that when a person is arrested for a misdemeanor, the person may be released after presenting a peace officer with satisfactory identification and signing a notice signifying the individual’s promise to appear.

Chapter 93 authorizes a peace officer to obtain a thumbprint or fingerprint on a promise to appear, if the person arrested for the infraction does not provide sufficient identification. Chapter 93 further authorizes a peace officer to obtain

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2. CAL. PENAL CODE § 853.5 (amended by Chapter 93); CAL. VEH. CODE § 40500(a) (amended by Chapter 93); see CAL. VEH. CODE § 40508(a) (West Supp. 1995) (declaring that a person who willfully violates a promise to appear is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested).

3. See CAL. PENAL CODE § 17(b) (West Supp. 1995) (defining a “misdemeanor” as any crime or public offense which is not an infraction or a felony).

4. Id. § 853.6(d) (amended by Chapter 93); CAL. VEH. CODE § 40504(a) (amended by Chapter 93).

5. CAL. PENAL CODE § 853.5 (amended by Chapter 93); CAL. VEH. CODE § 40500(a) (amended by Chapter 93); see CAL. PENAL CODE § 853.5 (amended by Chapter 93) (specifying that in all cases, except as stated in California Vehicle Code § 40302, § 40303, § 40305, and § 40305.5, in which one is arrested for an infraction, a peace officer shall only require the person to present a driver’s license or other satisfactory identification and to sign a written promise to appear); id. (noting that if the person does not have a driver’s license or other identification in his or her possession, the officer may require that a right thumbprint, or a left thumbprint or fingerprint if the person is missing or has a disfigured right thumb, be placed on the promise to appear); CAL. VEH. CODE § 40500(a) (amended by Chapter 93) (providing that whenever a person is arrested for any non-felony violation of the California Vehicle Code, or for a violation of any city or county traffic offense ordinance, and he is not immediately taken before a magistrate, the officer will prepare in triplicate a written notice to appear in court or before a person authorized to accept a bail deposit, containing the person’s name and address, his or her vehicle’s license number, if any, the name and address, when available, of the vehicle’s registered owner or lessee, the charged offense, and the time and place to appear; if the person does not have a driver’s license or other satisfactory identification in his or her possession, the officer may require that a right thumbprint, or a left thumbprint or fingerprint if the person has a missing or disfigured right thumb, be placed on the notice to appear); see also id. § 40302 (West 1985) (stating that persons charged with specified violations of the California Vehicle Code must make a mandatory appearance); id. § 40303 (West Supp. 1995) (enumerating the violations of the California Vehicle Code for which an immediate appearance before a Magistrate Judge is not required); id. § 40305.5 (West 1985) (specifying the offenses for which non-residents may simply execute a notice containing a promise to correct the violation); Schmerber v. California, 384 U.S. 757, 763-764 (1966) (holding that a person is not an involuntary witness against oneself unless he is compelled to testify or otherwise provides the State with testimonial or communicative evidence and specifying that, “both federal and state courts have usually held that . . . [the Fifth Amendment] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture”); id. at 764 (explaining that “compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate [the Fifth Amendment]”); Piquett v. United States, 81 F.2d 75, 81 (7th Cir. 1936) (taking judicial notice and declaring as “well recognized” the fact that fingerprint identification is probably the surest method known, and is universally used to detect criminals), cert. denied, 298 U.S. 664, (1936); cf. IDAHO CODE § 19-4806 (1987) (specifying that the Idaho state police have the authority and duty to obtain fingerprints, and other identification data as prescribed by the superintendent of those arrested and detained for non-misdemeanor offenses, and that they are obligated to properly transmit and file such fingerprints and identification data as prescribed by the superintendent). See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 341-47 (1991) (discussing the privilege against self-incrimination and which types of evidence are testimonial or communicative); M.C. Transfield, Annotation, Fingerprints, Palm Prints, or Bare Footprints as Evidence, 28 A.L.R. 2d 1115, 1118-19 (1953) (offering the background on fingerprinting and the admissibility of fingerprints, and stating that identifying people through fingerprints has become widely recognized as a relatively accurate system of establishing identity); Identification Verification for Employment, 1995: Hearings Before the Subcomm. on Immigration and Refugee Affairs of the Senate Judiciary Committee, 104th Cong., 1st Sess. (May 10, 1995) (statement of Jack Scheidegger, Chief, Bureau of Criminal
a thumbprint or fingerprint when a person has been arrested for a misdemeanor and does not have satisfactory identification. 6 Chapter 93 also specifies that the thumbprint or fingerprint will not be used to create a database. 7

COMMENT

Chapter 93 was enacted in response to situations in which individuals have misrepresented themselves to peace officers by giving a false name or a name of another person. 8 In such a situation, a warrant would have been issued in someone else’s name and that person would then be burdened with the task of appearing in court several times to clear his or her name. 9 Chapter 93 provides a solution to

Indentification, California Department of Justice), available in LEXIS, News Library, Cumws File (stating that without a reliable means of personal identification, such as fingerprinting, perpetrators may use false and fraudulent identification to avoid apprehension); Darryl Campagna, The View From Middletown; Burglars Beware. Fingerprinting Are Going Computerized, N.Y. TIMES, Apr. 16, 1995, at 13CN-2 (discussing a new computerized fingerprinting system which has the capacity to search twenty million fingerprints in two hours); Fingerprinting Criminals; Fingerprint Identification System, SECURITY MGMT., Jan. 1995, at 11 (discussing the new Advanced Fingerprint Identification System (AFIS) Series 2000 which performs up to two billion operations per second and allows police officers to know within minutes who the suspect is and if he or she has a criminal record); Ralph Vartabedian, The Power, Peril at Our Fingertips; New Fingerprint Technology Is Giving Crime Fighters a Boost, L.A. TIMES, Apr. 2, 1995, at A1 (discussing advanced new fingerprinting techniques, and stating that “fingerprinting systems represent the only existing technology that is both tamper-proof and easily automated on a nationwide basis”); Mike Ward, Unresolved Issues Stall Proposal to Reform Juvenile Justice System, AUSTIN AM.-STATESMAN, May 12, 1995, at B3 (discussing how the House of Representatives favors allowing photographing and fingerprinting of minors only if they have committed a serious misdemeanor or felony).

6. CAL. PENAL CODE § 853.6(d) (amended by Chapter 93); CAL. VEH. CODE § 40500(a) (amended by Chapter 93); cf. Ark. CODE ANN. § 12-12-1006(a) (Michie Supp. 1993) (specifying that immediately following an arrest, the officer must obtain the fingerprints of the person if the offense is a felony or a Class A misdemeanor); KAN. STAT. ANN. § 21-2501(a) (Supp. 1994) (specifying that two sets of fingerprints must be made immediately after a person is arrested if the person: (1) is wanted for a felony or believed to be a fugitive; (2) may be in the possession at the time of arrest of property reasonably believed to have been stolen by the person; (3) is in possession of firearms or other concealed weapons, burglary tools, high explosives, or other items used exclusively for criminal purposes; (4) is wanted for any offense involving prohibited sexual conduct or violation of the uniform controlled substances act; or (5) is suspected of or known to be a habitual criminal or intoxicating liquor law violator); N.C. GEN. STAT. § 15A-502(a) (Supp. 1994) (specifying that persons charged with a felony or a misdemeanor may be photographed and fingerprints may be obtained for law enforcement records only when the person has been arrested or committed to a detention facility, committed to imprisonment after conviction, or convicted of a felony); id. (stating that it is the duty of the arresting agency to obtain fingerprints from those charged with a felony, and to forward those fingerprints to the State Bureau of Investigation).

7. CAL. PENAL CODE § 853.5 (amended by Chapter 93); id. § 853.6(d) (amended by Chapter 93); CAL. VEH. CODE § 40500 (amended by Chapter 93); id. § 40504(a) (amended by Chapter 93).

8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 219, at 2 (May 2, 1995); see John Branton, Robbers Hit Second Grocery Store in 2 Days, COLUMBIAN, Jan. 31, 1995, at A5 (reporting that a man suspected of burglarizing mail boxes and mail shops in Portland, Oregon, gave a deputy a false name, and offered false identification when caught); Police and Fire Report, CHI. TRIB., Mar. 30, 1995, at 3 (discussing how a 24-year-old male allegedly gave false identification to a deputy after being stopped for allegedly driving with a suspended license).

9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 219, at 2 (May 2, 1995); see id. (explaining that when a false name is given to a law enforcement officer, a warrant is then issued in the other person’s name and this “victim” is then arrested for failing to appear on the citation, fingerprinted, and either booked into the county jail or given a new court date; in either case, the victim has to appear several
this problem by granting peace officers the authority to fingerprint violators; thus, law enforcement officials now have an easy way of apprehending the violator and the person who was wrongly named by the perpetrator has a very simple, cost-effective means for proving that he or she was not responsible.  

Molly J. Mrowka

Criminal Procedure; interstate jurisdiction


SB 1224 (Mountjoy); 1995 STAT. Ch. 526

Existing law provides for an interstate compact1 between California and Arizona for concurrent criminal jurisdiction with respect to crimes which occur between the two states on the Colorado River and any lake formed by it that is part of the common boundary between the two states.2

1. See U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from entering into compacts with other states without congressional consent); 4 U.S.C.A. § 112(a) (West 1985) (permitting two or more states to enter into compacts for a cooperative effort and mutual assistance in the prevention of crime and enforcement of their criminal laws); see also Cuyler v. Adams, 449 U.S. 435, 440 (1981) (declaring that the Framers of the Constitution intended to prevent state interference with the free exercise of federal authority by requiring congressional consent for interstate compacts); Cameron v. Mills, 645 F. Supp. 1119, 1126 (S.D. Iowa 1986) (stating that an interstate compact will become federal law where Congress has authorized the agreement and where the agreement is of an appropriate subject matter for congressional legislation). See generally Marlissa S. Briggett, Comment, State Supremacy in the Federal Realm: The Interstate Compact, 18 B.C. ENVTL. AFF. L. REV. 751 (1991) (discussing the development and operation of a typical interstate compact); BLACK'S LAW DICTIONARY 281 (6th ed. 1990) (defining "compact" as a working agreement, typically between states, related to matters of mutual concern).

2. CAL. PENAL CODE § 853.2 (West Supp. 1995); see id. § 853.1(a) (West Supp. 1995) (ratifying the Colorado River Crime Enforcement Compact); 72 Op. Cal. Att'y Gen. 37 (1989) (stating that the compact is not concerned with crimes committed on the banks of the river, but only crimes committed on the water where boundaries are difficult to determine); see also ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1224, at 3 (July 11, 1995) (reporting that the effectiveness of the Colorado River Compact depends on the coordination and cooperation between the law enforcement personnel of California and Arizona); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1224, at 2 (May 11, 1995) (observing that most crimes that fall within the compact consist mainly of unsafe boating practices and underage drinking); Letter from William A. Molini, Administrator, Division of Wildlife, Nevada, to Assemblymember Richard Mountjoy (Apr. 11, 1995) (copy on file with the Pacific Law Journal) (reporting that the Colorado River Compact was very effective in assisting law enforcement efforts and increasing public safety); cf. ARIZ. REV. STAT. ANN. § 37-620.11 (1993) (enacting the interstate compact for jurisdiction on the Colorado River). See generally CAL. PENAL CODE §§ 852-852.4 (West 1985) (adopting the Uniform Act on Fresh Pursuit); id. § 852.1(c) (West 1985) (defining "fresh pursuit" to include close and hot pursuits); id. § 852.2 (West 1985) (granting foreign officers the power to arrest and hold offenders who enter California with a foreign officer in fresh pursuit); id.

Selected 1995 Legislation
Chapter 526 authorizes the creation of a similar compact between California and Nevada for concurrent criminal jurisdiction with respect to crimes committed in a county where Lake Tahoe or the Topaz Lake forms a common boundary between the states.3

In addition, existing law defines a “yacht” or “ship broker” as a person who engages in various transactions concerning yachts that he or she does not own.6

Existing law requires yacht and ship brokers to be licensed and to pay a special fee for that license.7 Under existing law it is unlawful to violate the licensing requirements.8

Chapter 526 redefines the term, “yacht” or “ship broker,” to include those persons who lease and rent yachts.9 Chapter 526 excludes those persons who lease new yachts or yachts weighing over 300 gross tons from the definition of

§ 852.3 (West 1985) (requiring a foreign officer to appear with any offender arrested in California before a magistrate in the county where the arrest is made).

3. CAL. PENAL CODE §§ 853.3, 853.4 (enacted by Chapter 526); see id. § 853.3(a) (enacted by Chapter 526) (ratifying the California-Nevada Compact for Jurisdiction on Interstate Waters); id. § 853.4(b) (enacted by Chapter 526) (permitting either state to arrest, prosecute, and try offenders for crimes for which there is concurrent jurisdiction); id. § 853.4(e) (enacted by Chapter 526) (providing that concurrent jurisdiction only applies to crimes that are established in common between the two states); id. (barring either state from prosecuting an offender for an offense that the offender has already been convicted or acquitted of by the other state); cf. NEV. REV. STAT. § 171.076 (1992) (enacting the interstate compact for jurisdiction on interstate waters); id. § 171.077 (1992) (setting forth the text of the compact).

4. See CAL. HARB. & NAV. CODE § 701(a)(1) (amended by Chapter 526) (listing the specified transactions to include selling or offering to sell; buying or offering to buy; soliciting or obtaining listings of; or negotiating the purchase, sale, or exchange of yachts).

5. See id. § 701(c) (amended by Chapter 526) (defining "yacht" to mean any vessel over 16 feet in length and under 300 gross tons used to navigate water).

6. Id. § 701(a)(1) (amended by Chapter 526).

7. Id. § 708(a) (West Supp. 1995); see id. (providing that no person may act as a broker without first obtaining a license); id. § 717 (West Supp. 1995) (requiring a person to submit an application for a license as a broker to the Department of Boating and Waterways, along with the broker license examination fee); id. § 721 (West Supp. 1995) (providing a list of required subject matter that an applicant must have knowledge of before a broker’s license will be issued); id. § 722 (West Supp. 1995) (providing that a broker’s license is valid for one year, and then renewable every two years thereafter); id. §§ 732, 733 (West Supp. 1995) (Listing grounds for which a broker may have his or her license suspended or revoked); id. § 736 (West Supp. 1995) (listing fees and schedule of payment for a broker license and license examination).

8. Id. § 738 (West Supp. 1995); see id. § 738(a) (West Supp. 1995) (providing that a violation of the licensing requirements is a misdemeanor punishable by up to a $1000 fine except where the violation is committed willfully or knowingly in which case the violation is punishable by up to a $1000 fine and/or imprisonment in the county jail for up to one year); id. § 738(b) (West Supp. 1995) (providing that any person who acquires a broker’s license through fraud or a misrepresentation shall be punished by a fine of up to $1000 and/or imprisonment in the county jail for up to one year); id. § 739 (West Supp. 1995) (providing that any person who violates a licensing requirement shall also be civilly liable for an amount between $100 and $1500 for each violation).

9. Id. § 701(a)(2) (amended by Chapter 526); see id. (providing that this section applies to those who rent; offer to lease or rent; place for rent; solicit listings of yachts for rent; or negotiate the sale, purchase, or exchange of leases on yachts); cf. FLA. STAT. ANN. § 326.002(1) (West 1995) (defining “broker” as one who sells or buys; offers ornegotiates to buy or sell; solicits or obtains listings of; or negotiates the purchase, sale, or exchange of, yachts); N.Y. VEH. & TRAF. LAW § 2257-b (McKinney 1986) (describing a “broker” as a person who acts as an agent for either the buyer or the seller of a yacht for a fee or a commission).
Criminal Procedure

yacht or ship broker.10

COMMENT

Chapter 526 was enacted to ratify the California-Nevada Compact for Jurisdiction on Interstate Waters which would provide for the enforcement of California laws with regard to criminal acts committed on Lake Tahoe or Topaz Lake.11 Chapter 526 is intended to close the loopholes that have allowed some offenders to go unpunished for crimes committed in places where it was difficult to determine whether a crime was committed in one state or another.12

In addition, Chapter 526 was enacted to give the California Department of Boating and Waterways13 jurisdiction over brokers involved in illegal lease transactions for which the Department did not have prior jurisdiction.14

A. James Kachmar

10. CAL. HARB. & NAV. CODE § 710(c), (f) (amended by Chapter 526); see id. § 710(a)-(g) (amended by Chapter 526) (listing additional circumstances in which persons will not be considered yacht or ship brokers).

11. CAL. PENAL CODE § 853.3(d) (enacted by Chapter 526); see SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1224, at 3 (May 11, 1995) (noting that the legislature of Nevada ratified the compact in 1987). See generally Nevada, California Sign Interstate Probe Compact, LAS VEGAS REV. J., Aug. 27, 1994, at 2B (reporting that California and Nevada had agreed to a compact allowing police from each state to investigate drug and gang related crime on both sides of the border).

12. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1224, at 2 (July 11, 1995); see CAL. PENAL CODE § 853.3(b) (enacted by Chapter 526) (setting forth the legislative finding that law enforcement had been impaired because of the difficulty of determining where precisely a crime had been committed); see also SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1224, at 3 (Apr. 17, 1995) (noting that determining proper jurisdiction is difficult because an offender may cross back and forth between boundaries in a boat during the commission of the criminal act); Letter from John R. Bañuelos, Director, Department of Boating and Waterways, to Assemblymember Paula Boland (July 5, 1995) (copy on file with the Pacific Law Journal) (stating that SB 1224 will result in more effective boating law enforcement on Lake Tahoe and Topaz Lake). But see SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1224, at 4 (Apr. 17, 1995) (observing that it is difficult to determine how many people will be affected by the interstate compact).

13. See CAL. HARB. & NAV. CODE § 50 (West Supp. 1995) (creating the department of Boating and Waterways and enumerating its power and duties); id. § 63.9 (West Supp. 1995) (setting forth additional powers of the Department of Boating and Waterways).

14. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 1224, at 3 (Apr. 17, 1995); see id. (describing how licensed brokers will lease a yacht which he or she does not own and then abscond with the money); see also Letter from John R. Bañuelos, supra note 12 (promising that SB 1224 will increase consumer protection for those persons buying or leasing used vessels).
Criminal Procedure; juvenile offenders—victim’s statements to the court

AB 889 (Rogan); 1995 STAT. Ch. 234

Existing law, in cases where a minor has committed an act that would have been a felony if committed by an adult, requires a probation officer to obtain a statement concerning the offense, from the victim, the parent or guardian of the victim if the victim is a minor, or the victim’s next of kin in instances where the victim has died; the probation officer must also advise those persons of the time and place of the juvenile offender’s disposition hearing. Existing law also requires the probation officer to prepare a social study concerning the minor which includes these statements. Under prior law, any person who gave a statement was allowed to be present at the minor’s disposition hearing and to express his or her views concerning the offense at the court’s discretion.

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1. See CAL. WELF. & INST. CODE § 602 (West 1984) (providing that any person under the age of 18 who violates any law other than an ordinance establishing a curfew, comes under the jurisdiction of the juvenile court); id. § 707.1(a) (West Supp. 1995) (authorizing the prosecuting attorney to file criminal charges against a minor in a court of criminal jurisdiction after a hearing that determines the minor is not a proper subject to be dealt with under juvenile court law); see also In re Manuel L., 7 Cal. 4th 229, 234, 865 P.2d 718, 720-21, 27 Cal. Rptr. 2d 2, 4 (1994) (requiring the prosecution to present clear and convincing evidence that the minor knows the wrongfulness of his or her conduct before the minor can come within the jurisdiction of the juvenile court).

2. See CAL. PENAL CODE § 17(a) (West Supp. 1995) (defining “felony” as any offense punishable by death or incarceration in the state prison).

3. See CAL. WELF. & INST. CODE § 270 (West Supp. 1995) (requiring every county to appoint a probation officer); id. § 280 (West Supp. 1995) (providing that a probation officer must prepare a social study of a minor under his charge for the court which must include any matters relevant to a proper disposition of the juvenile’s case); id. § 281 (West 1984) (requiring the probation officer to report and make any recommendations to the court concerning the custody, status, or welfare of a minor in his or her charge).

4. Id. § 656.2(a) (amended by Chapter 234); see id. (requiring the probation officer to inform the victim of the victim’s right to institute a civil action against the minor and his or her parents). See generally In re Ricardo M., 52 Cal. App. 3d 744, 749, 125 Cal. Rptr. 291, 294 (1975) (stating that juvenile court proceedings are for the protection and benefit of the juvenile offender); Teri H. Alby, Comment, Effects of Recent Legislation on the California Juvenile Justice System, 17 U.S.F. L. REV. 705 (1983) (examining the development of juvenile criminal law in California up until 1982).

5. See CAL. WELF. & INST. CODE § 358.1(a)-(d) (West Supp. 1995) (requiring the social study to include (1) information concerning whether child protective services is a possible solution to the problem at hand, (2) what plan for return of the child is recommended by the probation officer, (3) whether the grandparents should be granted visitation rights, and (4) whether there should be further court action to free the child from parental control); id. § 706.5 (West Supp. 1995) (providing that the social study shall include the information listed in California Welfare and Institutions Code § 358.1(a), (b); see also CAL. R. CT. 1492(a) (providing that the social study shall include any information concerning the minor’s parole status and the probation officer’s recommendation for the disposition of the court); id. (requiring the probation officer to submit the social study to the court clerk at least 48 hours before the beginning of the disposition hearing).

6. CAL. WELF. & INST. CODE § 656.2(a) (amended by Chapter 234); cf. N.Y. FAM. CT. ACT § 351.1(4) (McKinney Supp. 1995) (permitting a victim impact statement, containing the victim’s version of the crime as well as the victim’s view as to the disposition of the case, to be included in an investigation report concerning a juvenile offender when such a statement is relevant).

7. 1989 Cal. Stat. ch. 569, sec. 3, at 1875-76 (enacting CAL. WELF. & INST. CODE § 656.2(b)).
Chapter 234 provides that any person giving a statement as permitted above, has the right to testify at the juvenile offender’s disposition hearing.  

Existing law also requires the court, after determining that the minor is properly within its jurisdiction, to receive into evidence the social study prepared by the probation officer, including the statements described above, and to state that the court has considered the social study. Chapter 234 requires the court to receive any written or oral statement concerning the offense offered by persons specified above. In addition, Chapter 234 requires the court to state that it has considered these statements.

COMMENT

Victims and their families have been able to participate and voice their views during adult criminal proceedings. Chapter 234 was enacted to expand these rights to include criminal proceedings against minors.
Chapter 234 is intended to recognize the concerns of victims, confront juveniles with the impact of their actions, and provide judges with a more fully delineated context from which to render decisions.15

A. James Kachmar

Criminal Procedure; misdemeanors—release on own recognizance

Penal Code § 1270 (amended).
AB 67 (Bowen); 1995 STAT. Ch. 51

Under existing statutory law, any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant providing bail.2

Journal) (observing that limiting the victim to a single statement will in no way impair the judge's ability to control the proceedings); Letter from Harriet C. Salano, Chair, Justice for Murder Victims, to Assembly-member James Rogan (Apr. 14, 1995) (copy on file with the Pacific Law Journal) (proposing that AB 889 will bring greater balance to the juvenile justice system which has tended to be unresponsive to the victims of juvenile crime); Letter from Jeannine L. English, Executive Director, Little Hoover Commission, to Assembly-member James Rogan (Mar. 1, 1995) (copy on file with the Pacific Law Journal) (proposing that AB 889 will bring greater balance to the juvenile justice system which has tended to be unresponsive to the victims of juvenile crime); Letter from Jeannine L. English, Executive Director, Little Hoover Commission, to Assembly-member James Rogan (Mar. 1, 1995) (copy on file with the Pacific Law Journal) (arguing that the juvenile court system focuses on the offender while paying little attention to the concerns of the victim).

15. 1995 Cal. Legis. Serv. ch. 234, sec. I, at 691; see ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 889, at 2 (May 18, 1995) (stating that allowing victims to testify at the hearings will help bring about a feeling of resolution to the crime); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 889, at 3 (May 9, 1995) (relating an incident where a probation officer whose son had been murdered by a juvenile, had trouble tracking the case against the offender because of the secrecy surrounding juvenile proceedings); id. (observing that the public perceives the juvenile criminal system as too lax, encouraging juvenile offenders to continue their lawless ways); see also Letter from Gary Barrett, Executive Director, Strike Back, to Assembly-member Paula Boland (Apr. 18, 1995) (copy on file with the Pacific Law Journal) (recognizing that in order to rehabilitate juvenile offenders, they must be made to realize that there are no victim-less crimes); Mareva Brown, Youth Court Reform Urged—Approve Crime Czar, Panel Says, SACRAMENTO BEE, Oct. 5, 1994, at B1 (reporting on the findings presented by the Little Hoover Commission after a seven-month study including the recommendation that victims or affected family members should be permitted to testify during the proceedings against a juvenile offender). See generally Sandy Harrison, Early Intervention Urged Against Violent Juvenile Crime, L.A. DAILY NEWS, Oct. 5, 1994, at N7 (reporting that there were 231,012 juvenile arrests in 1993, including 21,549 arrests for violent crimes in 1992 and 645 homicide arrests in 1992); Dan Walters, Juvenile Crime Turns Violent, SACRAMENTO BEE, Oct. 5, 1994, at A3 (predicting increase in juvenile crime in the later part of the decade as a result of the baby-boom during the 1980s).

1. See BLACK'S LAW DICTIONARY 1271 (6th ed. 1990) (defining "recognizance" as "an obligation entered into before a court or magistrate duly authorized for that purpose whereby the recognizer acknowledges that he will do some act required by law which is specified therein," and further stating that it is "an obligation undertaken by a person, generally a defendant in a criminal case, to appear in court on a particular day or to keep the peace").

2. CAL. PENAL CODE § 1270(a) (amended by Chapter 51); cf. ALA. CODE § 15-13-4 (1982) (directing that all judges or magistrates, when authorized to grant bail or release the defendant on his or her own recognizance, shall insure that every prisoner in jail has an opportunity to post bail in such cases where the prisoner is so entitled); N.Y. CRIM. PROC. LAW § 530.20(1) (McKinney 1995) (requiring that when a criminal...
Furthermore, under existing law, a defendant who is in custody and is arraigned on a complaint alleging a misdemeanor offense is entitled to an own-recognizance release unless the court determines that the release of the defendant will not reasonably assure the appearance of the defendant as required.\(^3\)

Chapter 51 requires that the court consider the seriousness of the offense charged to the defendant, the previous criminal record of the defendant, and the probability of his or her appearance at the trial or hearing of the case when setting the bail amount or determining if the defendant should be released on his or her own recognizance.\(^4\)

Moreover, when determining if the defendant shall be entitled to a recognizance release, Chapter 51 directs that the primary factor for the court is whether the defendant will be a threat to public safety.\(^5\) The secondary factor for the court to consider is whether the release of the defendant on personal recognizance will reasonably assure the appearance of the defendant as required.\(^6\)

Chapter 51 is made applicable to any person who is released pursuant to this section.\(^7\)

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3. CAL. PENAL CODE § 1270(a) (amended by Chapter 51).

4. Id.; see id. § 1275 (West Supp. 1995) (listing the factors that the judge or magistrate shall take into consideration when fixing the amount of bail).

5. Id. § 1270(a) (amended by Chapter 51); see CAL. CONST. art. I, § 28(e) (requiring that the judge or magistrate take into consideration when setting the bail amount or releasing the defendant, the previous criminal record of the defendant, and the probability of his or her appearance at the trial or hearing of the case; public safety shall be the primary consideration); CAL. PENAL CODE § 1275 (West Supp. 1995) (setting forth the factors for the judge or magistrate to consider in setting, reducing, or denying bail as the following: (1) "the protection of the public," (2) "the seriousness of the offense charged," (3) "the previous criminal record of the defendant," and (4) "the probability of his or her appearing at trial or hearing of the case"); id. (stating further that "in considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, alleged threats to the victim or a witness to the crime charged, and the alleged use of a firearm or other deadly weapon in the commission of the offense"). But see State v. Brown, 396 A.2d 134, 136-37 (Vt. 1978) (upholding the Vermont rule that a defendant cannot be entirely denied bail on the ground that his release would constitute a danger to the public, and further stating that to hold otherwise would render the scheme of statute meaningless; the statute is designed to release defendants that present no danger to the community, only requiring a promise to return to court); State v. Pray, 346 A.2d 227, 229 (Vt. 1975) (responding to a defendant whose initial conviction for first-degree murder was later reversed and remanded for a new trial; holding that bail may not be entirely denied a defendant on grounds that his release would constitute a danger to the public).

6. CAL. PENAL CODE § 1270(a) (amended by Chapter 51); see id. (rearranging the order of the factors for the court to consider in determining whether or not to release the defendant without bail). But cf. VT. STAT. ANN. tit. 13, § 7554(a)(1), (2) (1995) (indicating that the first factor for the court to consider in determining whether or not to allow a recognizance release is whether the release will reasonably assure the appearance of the defendant as required, and that the second factor is the threat to public safety). See generally 4 B. E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, PROCEEDINGS BEFORE TRIAL § 2034(3) (2d ed. 1989) (explaining the proceedings if a defendant released on his own recognizance fails to appear as promised).

7. CAL. PENAL CODE § 1270(b) (amended by Chapter 51); see id. §§ 1318-1320 (West 1982 & Supp. 1995) (discussing the release agreements and the relevant staff appointed to investigate defendants who are released on their own recognizance); id. §§ 1318-1320.5 (West 1982 & Supp. 1995) (discussing the release agreement and its requirements that enable a defendant to be released on his or her own recognizance and providing that a court, with the concurrence of the board of supervisors, may employ an investigative staff for Selected 1995 Legislation
COMMENT

Chapter 51 provides judges with the discretion to initially consider public safety as one factor in determining whether or not to release a defendant on his or her own recognizance. In assessing the threat to public safety, the judge or magistrate will look at the threat posed to the safety of victims, witnesses, and to the public at large.

However, assuring the defendants' appearance is still an element for courts to consider in either setting bail or allowing a recognizance release.

Perhaps the unspoken impetus behind the enactment of Chapter 51 is the unavoidable overcrowding of jails that will result from recent legislation addressing sentence enhancement. In fact, prisoners throughout the country are being released on their own recognizance due to jail overcrowding.

the purpose of recommending whether a defendant should be released on his or her own recognizance).

8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 67, at 1 (Apr. 18, 1995); see CAL. PENAL CODE § 1275 (West Supp. 1995) (requiring judges or magistrates in setting, reducing, or denying bail to consider public safety as the primary consideration). See generally Mark V. Pettine, Trends In Own Recognizance Release: From Manhattan to California, 5 PAC. L.J. 675, 680 (1974) (discussing the findings of experiments conducted in 1971 which revealed that the risk of someone being arrested in the same county for a new offense is low for defendants released on their own recognizance and those defendants forced to pay bail; more research is required to establish reliable patterns of conduct for defendants released on personal recognizance).


10. Id. at 1. See generally Pettine, supra note 8, at 683 (citing reports which concluded that releasing individuals on their own recognizance does not significantly increase the risk of failure to appear; further reporting that community ties tend to ensure that defendants will appear at their court dates); Armando Acuna, Court Must Justify Sending Drivers to AA, L.A. TIMES, Sept. 27, 1986, at 1 (reporting that the El Cajon Municipal judges have been instituting a policy which sends drunk drivers to Alcoholics Anonymous meetings to improve their appearance rates in court); Daryl Kelley, Court Costs May Offset Jailing Fee Revenue, L.A. TIMES, Sept. 23, 1990, at B1 (reporting that those defendants screened and released on their own recognizance failed to appear in court at a rate eighteen times higher than those cited and released without going through a screening process at the jail, and further stating that only 1.7% of those screened failed to appear while 30.5% who were ticketed missed court dates); Matt O'Connor, Bonds Put Crime Back on Street—Study Finds Many Rearrests, Missed Court Dates, CIT. TRIB., June 4, 1992, at 1 (citing a report that showed that in major metropolitan areas, the overall average arrest level ranged from 20-35%, and further indicating that the overall average of court "no-shows" ranged from 30-45% in major cities); Leslie Malland Werner, Overcrowding Spreads to Jails in U.S., N.Y. TIMES, Nov. 23, 1983, at A24 (noting that the overcrowding of local jails has resulted in the release of many prisoners on their own recognizance who were held on the lowest amount of bail). But see Jim Ross, Roofer Released Early from Jail Can't Be Found, ST. PETERSBURG TIMES, Jan. 26, 1993, at 1 (reporting that a misdemeanor who was arrested for driving on a suspended license and possession of marijuana, and who was released on his own recognizance because of his clean criminal record and upstanding employment record, failed to attend his court date and cannot be found).

11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 971, at 5 (Jan. 6, 1994); see id. (noting the belief of opponents of sentence enhancement legislation that its provisions will be ineffective to address the problem of recidivism but will merely overload an already burdened prison system); see also CAL. PENAL CODE § 667(a)(4) (West Supp. 1994) (imposing the sentence enhancement requirements for specified repeat offenders). See generally Mark W. Owens, Review of Selected 1994 California Legislation, 26 PAC. L.J. 202, 442-446 (1995) (discussing the impacts of the "three strikes you're out" legislation and critical issues raised by the enactment of the new law).

12. See Bill Kisliuk, City Says It's Found Answer to Jail Crowding, THE RECORDER, Oct. 4, 1994, at 1 (reporting that one of the elements of the plan to answer San Francisco's chronic jail overcrowding problem is allowing municipal courts the authority to release on their own recognizance inmates who would otherwise
Criminal Procedure

despite the increasing prison populations, Chapter 51 attempts to ensure that the safety of the public is not compromised as a result.

Tad A. Devlin

Criminal Procedure; parole

Penal Code §§ 3060.7, 14202.2 (new).
SB 856 (Thompson); 1995 STAT. Ch. 967

Existing law authorizes the Board of Prison Terms¹ to establish regulations under which inmates of state prisons may be paroled.² Existing law requires the Board of Prison Terms to revoke the parole of any prisoner who refuses to sign a parole agreement form, which would establish the conditions under which the parole is granted.³ Existing law also authorizes the Attorney General⁴ to maintain

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1. See CAL PENAL CODE §§ 5075-5082 (West 1982 & Supp. 1995) (setting forth the powers, duties, and authority of the Board of Prison Terms); see also id. § 3000(b)(6) (West Supp. 1995) (stating that the Board of Prison Terms has sole authority to grant paroles); id. § 5002(e) (West Supp. 1995) (stating that the Board of Prison Terms is vested with all the powers and duties of the following boards: (1) the Board of Prison Terms and Paroles, (2) the Advisory Pardon Board, (3) the Adult Authority, (4) the Woman's Board of Terms and Paroles, and (5) the Community Release Board).

2. Id. § 3040 (West 1982); see People v. Ray, 181 Cal. App. 2d 64, 69, 5 Cal. Rptr. 113, 116 (1960) (holding that parole is a privilege, not a matter of right granted to each inmate); People v. Denne, 141 Cal. App. 2d 499, 508, 297 P.2d 451, 457 (1955) (concluding that a grant of parole does not change a parolee's status as a prisoner since the parolee is not discharged from the judgment entered by the state, but merely serving the remainder of a sentence outside prison walls). See generally 3 B.E. Witkin & Norman L. Epstein, CALIFORNIA CRIMINAL LAW, Parole § 1734 (2d ed. 1989 & Supp. 1995) (discussing parole of inmates); Victoria J. Palacios, Go and Sin No More: Rationality and Release Decisions by Parole Boards, 45 S.C. L. REV. 567, 579-84 (discussing parole guidelines in general, and various methods to increase parolee compliance with conditional paroles).

3. CAL PENAL CODE § 3060.5 (West Supp. 1995); see id. (mandating that the prisoner sign all forms required by the State, including forms that detail conditions for which parole was granted, forms which acknowledge that the parolee will register with the local authorities of his new residence, and forms which call for the prisoner to provide samples of blood or saliva; if the prisoner does not sign any of these forms, the maximum amount of additional prison time that can be served is six months); see also id. § 3053(a) (West Supp. 1995) (permitting the Board of Prison Terms to require any conditions it deems appropriate, to be agreed to in writing before an inmate is allowed to leave the prison on parole); In re Schoengarth, 66 Cal. 2d 295, 301, 425 P.2d 200, 204, 57 Cal. Rptr. 600, 604 (1967) (holding that a prisoner is not required to accept a conditional parole, but he cannot convert it into an unconditional parole by merely rejecting the conditions attached; to be effective, a parole must be accepted as offered by the Board of Prison Terms); In re Kimter, 37 Cal. 2d 568,
the California Law Enforcement Telecommunications System, a computer system which monitors information concerning missing persons and stolen property.\(^5\)

Chapter 967 requires the Board of Prison Terms to inform any inmate in the highest control or risk classification who is released on parole that he or she has two days from the time he or she has been released to report to his or her assigned parole officer.\(^6\) Chapter 967 also requires the Board of Prison Terms, within twenty-four hours of the parolee’s failure to report to his or her parole officer, to issue a written order suspending his or her parole, and to issue a warrant\(^7\) for the parolee’s arrest.\(^8\) Chapter 967 requires the Department of Corrections\(^9\) to release

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\(^5\) 575, 233 P.2d 902, 907 (1951) (announcing that once a prisoner has accepted a conditional parole, the parolee is bound by the express terms of that parole); People v. Knox, 95 Cal. App. 3d 420, 427, 157 Cal. Rptr. 238, 242 (1979) (stating that a condition of parole is invalid if it (1) has no relationship to the crime which the prisoner had been convicted of, (2) relates to conduct that is not criminal, or (3) requires or forbids conduct that is not reasonably related to future criminal acts); cf. KAN. STAT. ANN. § 75-5217(a) (Supp. Pamphlet 1994) (stating that the Secretary of Corrections may issue an arrest warrant for any violation of a condition under which parole was granted); MD. ANN. CODE art. 41, § 4-511 (1993 & Supp. 1994) (instructing that if a condition for parole is violated, a parole revocation committee will determine if the parolee returns to prison, or remains on parole).


\(^7\) Id. § 15152 (West 1992); see id. (requiring the Department of Justice to maintain the California Law Enforcement Telecommunications System); id. § 15153 (West 1992) (stating that the California Law Enforcement Telecommunications System is under the direction of the Attorney General); CAL. PENAL CODE § 14201 (West 1992) (mandating that the Attorney General include in the California Law Enforcement Telecommunications System a file containing any information available concerning missing persons and specific stolen property); cf. 49 U.S.C.A. § 33109 (West 1995) (establishing the National Stolen Vehicle Information System, as a part of the National Crime Information Center, which allows federal, state, and local authorities access to information concerning stolen vehicles); ALASKA STAT. § 12.62.110(1) (Supp. 1994) (establishing a comprehensive criminal justice information system); COLO. REV. STAT. § 24-33.5-223 (1988) (establishing a state telecommunications network for law enforcement and public safety); ME. REV. STAT. ANN. tit. 25, § 1508 (West 1988) (establishing a law enforcement telecommunications system for exchanging and distributing information relating to police problems); OR. REV. STAT. § 181.730 (Supp. 1994) (creating a law enforcement data system for storage and retrieval of criminal information).

\(^8\) CAL. PENAL CODE § 3060.7(a) (enacted by Chapter 967); see id. (stating that the Board of Prison Terms may demand that a parolee report to his or her parole officer in less than two days).

\(^9\) See BLACK’S LAW DICTIONARY 1585 (6th ed. 1990) (defining "arrest warrant" as a written order of a court, on behalf of the state, or of the United States, that is based upon a complaint issued pursuant to statute or court rule, and which commands law enforcement officers to arrest a person and bring that person before a magistrate); see also Pillsbury v. State, 142 N.W.2d 187, 190 (Wis. 1966) (defining "arrest warrant" as stated above, but also stating that after commission of a felony, no arrest warrant is necessary for placing a criminal under arrest).
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an inmate before or after his or her scheduled release date if the release date falls on the day before a holiday or a weekend.10

Chapter 967 also requires the Department of Justice11 to cooperate with the Department of Corrections in order to input the parolee’s record and release file onto the California Law Enforcement Telecommunications System, thus providing law enforcement personnel with updated information on potentially dangerous parolees.12

COMMENT

Chapter 967 will ensure that surveillance and supervision of parolees begins as soon as possible after their release from prison.13 Chapter 967 was introduced in response to the slaying of a Sonoma County sheriff’s deputy by a recently paroled inmate from Pelican Bay State Prison.14 The inmate, Robert Scully, had a history of violence and upon his release from prison he had been told to report to his parole officer by the next business day.15 Yet, since he was released on a Friday, he had the weekend before he was supposed to report to his parole officer.16 He did not report on Monday, the day he was supposed to, and allegedly killed a Sonoma County sheriff deputy on Wednesday.17 A warrant for his arrest

32, 105 Cal. Rptr. 318, 323-24 (1972) (holding that inmates who have been granted parole, but not yet released from custody, may have their parole rescinded if the requirements of Morrissey are satisfied, with the exception of the preliminary hearing, which is not applicable in parole revocation proceedings). See generally CAL. CODE REGS. tit. 15, §§ 2620-2744 (1991) (discussing regulations regarding parole revocation hearings).
10. Id. § 3060.7(c), (d) (enacted by Chapter 967).
11. See CAL. GOV’T CODE §§ 15000-15006 (West 1992) (setting forth the powers, duties, and authority of the California Department of Justice).
12. CAL. PENAL CODE § 14202.2 (enacted by Chapter 967); see id. (mandating the release file to be updated every 10 days to reflect the current status of the inmates parole); Diana Sugg, Pilot Program Keeps High-Tech Tabs on Parolees, SACRAMENTO BEE, Dec. 13, 1992, at B1 (reporting that a pilot program similar to the one initiated by Chapter 967 worked extremely well, with 1200 law enforcement contacts made with parolees that parole agents would have never known about without the system); cf. COLO. REV. STAT. § 17-2-102(9) (Supp. 1994) (establishing a telecommunications system for the purpose of providing law enforcement agencies information concerning parolees).
13. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 856, at 2 (May 25, 1995); see Jamie Beckett, State Cracking Down on Career Criminals, S.F. CHRON., Apr. 25, 1995, at A13 (reporting that state law enforcement agencies do not have the resources to focus on every violent criminal who is released from prison, yet SB 856 would call for increased attention and manpower to be spent on monitoring parolees).
14. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 856, at 2 (May 25, 1995); see Legislator Proposes Arrest Warrants for Wayward Parolees, S.F. CHRON., Apr. 7, 1995, at A23 (announcing that California State Senator Mike Thompson reacted to the killing of the Sonoma deputy sheriff by proposing legislation which would require the state to issue arrest warrants for inmates who fail to report to their parole officers).
15. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 856, at 2 (May 25, 1995); see Glen Martin & Tyra Mead, 2 Arrested in Stabbing of Deputy; Hostages Safe in Sonoma County, S.F. CHRON., Mar. 31, 1995, at A1 (detailing Scully’s criminal record, which includes robbery, grand theft, and assault).
17. Id.; see Donna Horowitz, Deputy's Alleged Killers Nabbed After Hostage Scene; Santa Rosa Family OK After Held 7 Hours at Gunpoint, S.F. EXAMINER, Mar. 31, 1995, at A4 (reporting that six days after his release from prison, Scully allegedly shot a sheriff deputy in the face with a shotgun, and then took hostages
was issued by the Department of Corrections on Thursday for failing to report to his parole officer, yet he had already been arrested the day before for the murder of the sheriff's deputy.  

Chapter 967 is designed to ensure that parolees report to their parole officer in a timely manner, and if they fail to report, Chapter 967 mandates that law enforcement agencies be immediately notified.  

Chapter 967 puts an end to holiday and Friday parole releases which gave inmates an additional two days of unsupervised activity, and requires them to report to their parole officers within forty-eight hours no matter where they are situated within the state.  

The opposition to Chapter 967 is concerned with the strict language of the legislation, which allows for no excuses or extenuating circumstances to lengthen the time needed for parolees to report to their parole officers.  

The opposition also points out that Chapter 967 creates a minor anomaly in that inmates who are released on a Thursday do not have forty-eight hours to report to their parole officer, but rather they have only twenty-four hours to report.  

The author of Chapter 967 believes that the Board of Prison Terms will be best able to handle this minor anomaly, in that they will be allowed to release the inmate on a Wednesday, instead of a Thursday, and thus allow the parolee the statutory time to reach his or her parole officer.  

The fiscal impact of Chapter 967 is measured by the increased costs for issuing warrants, for holding parole revocation hearings, and also by the increased amount of inmates that must stay in California prisons as a result of this new
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Yet the price tag for Chapter 967 is well worth the increased protection given to both the general public and the law enforcement community.25

Ralph J. Barry

Criminal Procedure; peace officers—reserve park rangers

Penal Code § 830.6 (amended).
AB 787 (McDonald); 1995 STAT. Ch. 54
(Effective June 30, 1995)

Under existing law, specific persons deputized or appointed as reserve police officers qualify for peace officer1 status. Existing law provides that in order for

24. See SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 856, at 1-2 (May 15, 1995) (stating that in 1994, roughly 4834 parolees did not report to their parole officers as required, so with an arrest warrant at $75 per warrant, the price to issue warrants for all of these inmates is approximately $350,000); id. (declaring that the price to hold a parole revocation hearing is $135, thus a total cost estimate for 1994 would have been $653,000); id. (stating that it takes an average of 45 days to have a parole revocation hearing, thus this additional time period costs the state $1833 per 45 day period, for a total of $8.9 million for the entire paroled population waiting for parole revocation hearings).
25. See Daniel W. Weintraub, The Perils of Parole Reform; Running State’s Complex System is a Delicate Balancing Act, L.A. TIMES, Sept. 17, 1994, at Al (reporting that under the existing parole system, public safety is a predominate concern, yet in reality none is provided; the parole system is merely pretending to provide it). But see id. (conceding that even with proposed changes in the parole system, California sends more parolees back to prison then all other 49 states combined).

2. Id. § 830.6(a)(1) (amended by Chapter 54); see id. (providing that whenever any person is deputized or appointed by proper authority as a reserve or auxiliary city police officer, reserve or auxiliary sheriff or deputy sheriff, reserve police officer of a regional park or transit district, reserve deputy marshall, reserve harbor or port police officer, reserve deputy of the Department of Fish and Game, reserve special agent for the Department of Justice, reserve officer of a community service district, school district, or police protection district, and is assigned specific police functions by that authority, such reserve officer is a peace officer after having qualified under California Penal Code § 832.6); see also CAL. LAB. CODE § 3362.5 (West Supp. 1995) (establishing that any qualified person deputized or appointed as an auxiliary or reserve sheriff or city police officer, deputy sheriff, or reserve police officer of a regional park or transit district is to be considered an employee of that county, city and county, town, or district while performing peace officer functions); CAL. PENAL CODE § 830.2 (West Supp. 1995) (listing those law enforcement officers who qualify as peace officers with state-wide authority); id. § 832.6 (West Supp. 1995) (providing that every person deputized or appointed as described in § 832.6(a) of the California Penal Code has the powers of a peace officer if such person meets one of the following conditions: (1) assignment to the detection and prevention of crime and the general enforcement of California law, and completion of basic training for the applicable position, subject to an exemption from such training requirements for reserve officers; (2) assignment to the prevention and detection of crime and the general enforcement of California law while under the supervision of a peace officer possessing a basic certificate, while engaged in a field training program, and having completed the required course work and training; (3) deployment and authorization to carry out limited duties of general law enforcement under the direct supervision of a peace officer in possession of a basic certificate, having completed the proper training; or (4) assignment to the prevention and detection of particular crimes, or to the detection and apprehension of a particular individual, under the supervision of a peace officer in a county

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one to use the title of ranger, park ranger, forest ranger, or similar titles, one must first qualify for peace officer status. Chapter 54 grants reserve park rangers peace officer status.  

COMMENT

The purpose of Chapter 54 is to allow reserve park rangers to attain peace officer status. Approximately forty percent of all park rangers in the City of Long Beach are volunteer reserve park rangers. This reserve park ranger program was declared a success for Long Beach because it made the experience of local parks more enjoyable for visitors. Chapter 54 merely extends to reserve park rangers the same peace officer status afforded other reserve police officers.

Daniel L. Keller
Criminal Procedure

Civil Code § 2225 (amended).
SB 287 (Calderon); 1995 STAT. Ch. 262

Under existing law, California’s “Son of Sam” statute prevents criminals from gaining financially from their crimes. The statute provides that any


2. CAL. CIV. CODE § 2225 (amended); see Marnie I. Smith, Review of Selected 1994 California Legislation, 26 PAC. L.J. 202, 488-92 (1995) (explaining how California’s “Son of Sam” law differs from New York’s); Snider, supra note 1, at 29-30 (explaining that California’s “Son of Sam” law is comparatively weak compared to New York’s analogous law, and noting that the most striking aspect of “Son of Sam” laws generally is that they are often unknown and unenforced); id. (stating that criminals, agents, publishers and producers benefit from crime stories in a way that sometimes victimizes the victims all over again). See generally Gregory G. Sarno, Annotation, Validity, Construction, and Application of “Son of Sam” Laws Regulating or Prohibiting Distribution of Crime-Related Book, Film, or Comparable Revenues to Criminals, 60 A.L.R.4TH 1210, 1213-17 (1988) (discussing the background and various constitutional issues raised by “Son of Sam” laws and giving a summary comparison of 27 different states’ adaptations); State Uses “Son of Sam” Law for First Time, L.A. Times, Apr. 15, 1995, at 1 (reporting that California State Attorney General Dan Lungren filed suit against Death Row inmate Rodney Alcala for earnings from a published book regarding the killing of a 12-year-old Huntington Beach girl); id. (reporting that Lungren also filed suit against former Billionaire Boys Club leader Joe Hunt, who profited from setting up a “900” telephone number which people could call to hear him describe life in prison after he was convicted for killing a man who cheated him
proceeds\(^3\) or profits\(^4\) received by a convicted felon\(^5\) for the sale\(^6\) of the rights to the story or the sale of materials\(^7\) that include or are based on the story\(^8\) of the convicted felon, are subject to an involuntary trust\(^9\) for the benefit of the beneficiaries\(^10\) of the crime.\(^11\) Existing law provides that any beneficiary may

in a commodities-trading scheme).

3. See CAL. CIV. CODE § 2225(a)(9) (amended by Chapter 262) (defining “proceeds” as all fees, royalties, real property, or other consideration of any and every kind or nature received by or owing to a felon or his or her representatives for the preparation for the purpose of sale of materials, for the sale of the rights to materials, or the sale and distribution by the convicted felon of materials whether earned, accrued, or paid before or after the conviction); id. (stating that “proceeds” includes any interest, earnings, or accretions upon proceeds, and any property received in exchange for proceeds); see also id. § 2225(a)(3) (amended by Chapter 262) (defining a “representative of the felon” as any person or entity receiving proceeds by designation of that felon, or on behalf of that felon or in the stead off that felon, whether by the felon’s designation or by operation of law).

4. See id. § 2225(a)(10) (amended by Chapter 262) (defining “profits” as all income from anything sold or transferred, including any right, the value of which is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted). This income may have been accrued, earned or paid before or after the conviction. However, voluntary donations or contributions to a defendant to assist in the defense of criminal charges shall not be deemed to be profits, provided the donation or contribution to that defense is not given in exchange for some material of value. Id.

5. See id. § 2225(a)(1) (amended by Chapter 262) (describing a “convicted felon” as any person convicted of a felony, or found not guilty by reason of insanity of a felony committed in California, either by a court of jury trial or by entry of a plea in court); id. § 2225(a)(2) (amended by Chapter 262) (clarifying that a “felony” includes any felony defined by a California or United States statute); see also id. § 17(a) (West Supp. 1995) (defining a “felony” as a crime punishable by death or imprisonment in a state prison).

6. See CAL. CIV. CODE § 2225(a)(6) (amended by Chapter 262) (defining “sale” to include lease, license, or any other transfer or alienation taking place in California or elsewhere).

7. See id. (defining “materials” as meaning books, magazine or newspaper articles, movie, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind).

8. See id. § 2225(a)(7) (amended by Chapter 262) (defining a “story” as a depiction, portrayal, or reenactment of the story, and shall not be taken to mean a passing mention of the felon, as in a footnote or bibliography).

9. See id. § 2225(b)(1) (amended by Chapter 262) (specifying that all proceeds from the preparation for the purpose of sale, the sale of the rights to, or the sale or materials that include or are based on the story of a felony for which a felon was convicted are subject to an involuntary trust); id. § 2225(b)(2) (amended by Chapter 262) (specifying that the trust shall continue until five years after the time of payment of the proceeds to the felon or five years after the date of conviction, whichever is later; if an action is filed by a beneficiary to recover his or her interest in a trust within those time limitations, the trust character of the property shall continue until the conclusion of the action); id. (specifying that at the end of the five-year trust period, any profits which remain in trust that have not been claimed by a beneficiary shall be transferred to the Controller to be allocated to the Restitution Fund for the payment of claims pursuant to California Government Code § 13969); Review of Selected 1984 California Legislation, 15 PAC. L.J. 570, 572-74 (1964) (discussing the enactment of the involuntary trust provision).

10. See CAL. CIV. CODE § 2225(a)(4)(A) (amended by Chapter 262) (defining a “beneficiary” as a person who, under applicable law, other than the provisions of this section, has or had a right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted); id. § 2225(a)(4)(B) (amended by Chapter 262) (explaining that if the beneficiary described in California Civil Code § 2225(a) has died, “beneficiary” also includes a person or estate entitled to recover damages pursuant to certain provision of the California Code of Civil Procedure); id. § 2225(a)(4)(C) (amended by Chapter 262) (adding that if a person has died and the death was proximately caused by the convicted felon as a result of the crime for which the felon was convicted, “beneficiary” also includes a person described in California Civil Code Procedure § 377.10, and any beneficiary of a will of the decedent who had a right under that will to receive more than 25% of the value of the estate of the decedent); CAL. CIV. PROC. CODE § 377.60 (West Supp. 1995) (stating
bring an action against a convicted felon or representative of the felon to recover his or her interest in the trust. Existing law also provides that the California Attorney General may bring an action to require the proceeds or profits received by a convicted felon to be held in an express trust in a bank authorized to act as a trustee.

Under existing law, a court must grant a preliminary injunction, upon motion of a party, to prevent any waste of proceeds or profits if it appears that the proceeds or profits are subject to the provisions of California Civil Code section 2225 and that they may be subject to waste. Chapter 262 expands California's "Son of Sam" law by establishing the requirement that a court, upon motion by the California Attorney General or by victims of the crime, must grant a preliminary injunction against a person against whom an indictment or information for a felony has been filed in superior court to prevent any waste of profits or proceeds if there is probable cause to believe that the proceeds or profits would be subject to an involuntary trust pursuant to California Civil Code section 2225.
upon a conviction of this person, and that they may be subject to waste.\textsuperscript{15} Previously, a preliminary injunction was only available against convicted felons.\textsuperscript{16}

Chapter 262 also expands the definitions of proceeds and profits to include income which may have been accrued, earned, or paid before or after the conviction.\textsuperscript{17}

\textbf{COMMENT}

Chapter 262 was introduced in response to the need for pre-conviction freezing of assets when an accused felon could potentially receive increased profit earnings due to notoriety gained from the criminal act.\textsuperscript{18} Examples of recent cases raising the issue of profiteering from crime include the cases of Snoop Doggy Dogg (a.k.a. Calvin Broadus) and O.J. Simpson.\textsuperscript{19}

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\textsuperscript{15} Id. § 2225(f)(2) (amended by Chapter 262); see id. § 2225(g) (amended by Chapter 262) (establishing that any violation of an order of court will be punishable by contempt); id. § 2225(h) (amended by Chapter 262) (specifying that the remedies provided in California Civil Code § 2225 are in addition to those provided by law); see also id. § 2225 (amended by Chapter 262) (noting that no period of limitations, except those provided by California Civil Code § 2225, will limit the right of recovery under California Civil Code § 2225).

\textsuperscript{16} Id. § 2225(f) (amended by Chapter 262).

\textsuperscript{17} Id. § 2225(a)(9), (10) (amended by Chapter 262).

\textsuperscript{18} SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 287, at 2-3 (Mar. 21, 1995); id. (explaining that although Senator Calderon, the author of SB 287, was under the impression that the statute already allowed preliminary injunctions to be granted before conviction, the Attorney General disagreed, based on the repeated use of the term "convicted felon" throughout the statute, and the Attorney General refused to seek pre-conviction injunctive relief unless the law was clarified).

\textsuperscript{19} ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 287, at 4 (June 21, 1995); Larry King Live: Cashing In On High-Profile Cases (CNN television broadcast, Aug. 4, 1994) (transcript #1191 on file with the Pacific Law Journal) (discussing how persons, such as O.J. Simpson, who are involved in high-profile cases, gain profit and media attention); Jack Cheever et al., Violence Tops the Charts, L.A. TIMES, Apr. 3, 1995, at A1 (discussing the background of Snoop Doggy Dogg and noting that the negative publicity surrounding his arrest for murder did not hurt his sales); David Grogan, Cashing In; Crime and Scandal May Not Pay for the People Involved, But There Are Fortunes to Be Made on the Sidelines, PEOPLE, Aug. 8, 1994, at 26 (discussing the lucrative deals that O.J. Simpson, Jefferey Dahmer and John Wayne Gacy received for their notoriety gained from either being charged with or convicted of heinous crimes); Gregory Jaynes, Getting a Word in Edgewise; To Bankroll His Defense, the Accused Expands the Lucrative O.J. Industry with a Self-Justifying Book, TIME, Feb. 6, 1995, at 64 (discussing O.J. Simpson's $1 million book deal for his book entitled, I Want To Tell You, in which O.J. Simpson stated that he would have "jumped in front of a bullet" for his murdered ex-wife, Nicole Brown Simpson); David Klinghoffer, See No Evil; Failure of Media to Deal with Crime and Violence Committed by Rap Singers, NAT. REV., Jan. 24, 1994, at 73 (noting the adverse incentives created when criminals profit by publicizing their crimes); Shannon D. Montgomery, Teen 2 Teen: Crook Books; Whenever a Heinous Crime Hits the Headlines, the Profiteers of Publicity Won't Be Far Behind, NEWS TRIB., May 28, 1994, at D3, (discussing how Amy Fisher, David Berkowitz (Son of Sam), Jefferey Dahmer, the Menendez brothers, Charles Manson, Tonya Harding and Ted Bundy have been glorified and economically enriched by their notoriety); Chris Morris, ON'R Cover of Manson Song Incites Uproar; "Son of Sam" Law May Bar Convict's Royalties, BILLBOARD, Dec. 11, 1993, at 5 (discussing the possibility of California's Attorney General invoking the "Son of Sam" law to force the forfeiture of all profits made by Charles Manson for one of his songs which was released on an album by Guns N' Roses); Lynn Rosellini, Selling a Piece of Hinckley, U.S. NEWS & WORLD REP., Mar. 13, 1995, at 66 (discussing the news that John Hinckley, the man who attempted to assassinate President Reagan, decided to "tell-all" and that his lawyer is hoping for a movie, a made-for-television movie, or a book deal); CNN & Company With Mary Tillotson: Is Tonya Harding Heading for a Fall, Perhaps Tripped up by Her Former Husband? (CNN television broadcast, Jan. 27, 1994)
Chapter 262 serves as a mechanism to temporarily freeze the transfer of profits earned before a conviction. Without Chapter 262, a defendant could feasibly remove these potentially enormous profits from the reach of the court.

Chapter 262 raises a multitude of constitutional issues. The Sixth Amendment of the United States Constitution guarantees that, in all criminal proceedings, the accused has the right to the assistance of counsel for his defense. In Caplin & Drysdale v. United States and United States v. Monsanto, the United States Supreme Court upheld as constitutional a preliminary injunction provision in the federal Comprehensive Forfeiture Act which is identical in purpose and effect as the provision authorizing preliminary injunctions in Chapter 262. In Caplin & Drysdale, the Court held that the Sixth Amendment right to counsel was not violated by an injunction issued, even though the injunction prevented a defendant from transferring forfeitable assets to his attorney in order to pay his legal fees. Chapter 262 should also be able to withstand an attack on Sixth Amendment grounds because the injunction authorized by Chapter 262 would not prevent a defendant from paying an attorney with funds that are unrelated to his commission of a crime. Furthermore, Chapter 262 places less of a burden on the right to counsel than the federal asset forfeiture law because even if a preliminary injunction were to temporarily prevent a defendant from transferring proceeds or profits to his attorney, ultimately, under Chapter 262, up to 40% of all a defendant’s proceeds or profits may be put out of reach of the beneficiaries and used by the defendant to pay his legal obligations including his legal fees.

(transcript #281 on file with the Pacific Law Journal) (noting that Tonya Harding might make more money through her notoriety than from her ice skating).

20. CAL. CIV. CODE § 2225 (amended by Chapter 262); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 287, at 3-4 (Mar. 21, 1995).

21. Id. at 4-10.

22. U.S. CONST. amend. VI.; see Caplin & Drysale, Chartered v. United States, 491 U.S. 617, 624 (1989) (explaining that “[t]he [Sixth] Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by an attorney appointed by the court”).


24. 491 U.S. 600 (1989); see id. at 616 (concluding that “if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial”).


26. Caplin, 491 U.S. at 625; see id. (stating that the statute that authorizes forfeiture to the government of property acquired as a result of drug-law convictions, does not impermissibly burden a defendant’s Sixth Amendment right to counsel); id. at 626 (specifying that “[a] defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney, even if those funds are the only way in which that defendant will be able to retain the attorney of his choice”).

27. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 287, at 4 (Mar. 21, 1995); see CAL. CIV. CODE § 2225(b) (amended by Chapter 262) (specifying that only proceeds or profits that are from the preparation for the purpose of sale, the sale of the rights to, or the sale of materials that include or are based on the story of a felony for which the convicted felon was convicted are subject to the involuntary trust).

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Aside from the aforementioned right to counsel issue, there is an argument that a defendant's Fifth Amendment right to a fair criminal trial would be affected by the issuance of a pre-conviction injunction. However, the granting of the injunction, pursuant to the provisions enacted by Chapter 262, would take place in a separate civil proceeding, so as not to prejudice the defendant's innocence or guilt.

Chapter 262 also raises Fifth Amendment due process concerns regarding punishment without adjudication of guilt. The Fifth Amendment specifies that punishing persons before they are found guilty violates due process. However, in *Bell v. Wolfish*, the United States Supreme Court held that subjecting pretrial detainees to a number of restrictions, including body cavity searches after each contact with an outside visitor, did not constitute punishment in violation of due process. The restrictions in *Bell* were not found to violate due process because the court found that the restrictions were not imposed for the purpose of punishment, but instead were viewed as "an incident of some other legitimate government purpose." Likewise, the purpose of Chapter 262 was to prevent a defendant from placing assets, which might rightfully belong to the victims of the crime, out of judicial reach. Since Chapter 262's injunctions serve a compelling state interest, which is unrelated to a desire to punish the defendant, the injunctions authorized by Chapter 262 would appear not to constitute pre-trial punishment under *Bell*.

Chapter 262 also raises significant First Amendment concerns. One of the reasons that the court in *Simon & Schuster, Inc. v. Members of the N.Y. State Senate Judiciary Committee*, Committee Analysis of SB 287, at 5 (Mar. 21, 1995); see CAL. CIV. CODE § 2225(d) (amended by Chapter 262) (specifying that the maximum the beneficiaries may recover is 60% of the profits or proceeds).
Crime Victim's Bd. found the New York "Son of Sam" statute to be unconstitutional was because the statute could apply to speech by a person not accused or convicted of a crime. Similarly to New York's "Son of Sam" law, Chapter 262 expands California's statute to reach persons not convicted of crimes, thus making California's statute more amenable to a constitutional challenge under the Simon & Schuster analysis. However, unlike the New York "Son of Sam" statute under which persons not accused or convicted could have their incomes permanently taken from them, Chapter 262 only allows a temporary freezing of assets until the person is convicted.

Opponents contend that Chapter 262 also raises a concern about "prior restraint." On the contrary, it is unclear whether an injunction under Chapter 262 would be a "prior restraint," because injunctions pursuant to Chapter 262 would not prohibit a defendant from engaging in expressive behavior, or from being paid for expressive behavior. The preliminary injunction only prohibits the defendant's use of the payments received from expressive activity for a limited time.

For all of the above mentioned reasons, the survival of Chapter 262 against

41. Simon & Schuster, 502 U.S. at 121; see id. (stating that one of the flaws in New York's "Son of Sam" law was that it was overinclusice; it enabled the New York Crime Victims Board to, "escrow the income of any author who admits in his work to having committed a crime, whether or not the author was actually accused or convicted"); id. (specifying that "[h]ad [New York's] Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became a public figure; Civil Disobedience, in which the author laments 'my past foulness an the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring vineyard"); id. at 122 (noting that other people who would have been subjected to New York's "Son of Sam" law would have included, "Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons").
42. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 287, at 8 (Mar. 21, 1995). See generally, Mark Conrad, The Demise of New York's 'Son of Sam' Law—The Supreme Court Upholds Convicts' Rights to Sell Their Stories, 64 N.Y. ST. BAR J. 28, 32 (Mar./Apr. 1992) (stating that in order to withstand constitutional scrutiny, a revised "Son of Sam" law can not possibly include people who have merely been accused of a crime because, "[i]f our criminal justice stands for anything, it is that one is innocent until proven guilty"). The mention of one "accused of a crime requiring to turn over monies turns this notion on its head.
Id. See generally Zavack, supra note 1, at 719 (stating that one of the essential criteria of a constitutional "Son of Sam" law is that it does not apply to those whom are accused, but limited to those who are actually convicted).
43. CAL. CIV. CODE § 2225(b) (amended by Chapter 262).
44. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 287, at 8 (Mar. 21, 1995); see id. (specifying that under Nebraska Press Ass'n v. Stuart, there is a possibility that a court could find that a preliminary injunction, as it applies to speech-related activities, would violate the First Amendment); see also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (affirming that "the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact").
45. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 287, at 8 (Mar. 21, 1995).
46. Id.; see CAL. CIV. CODE § 2225(b) (amended by Chapter 262) (specifying that the involuntary trust will continue until five years after the time of payment of the proceeds or profits to the felon, or five years after the date of conviction).
Criminal Procedure

Because of the expansive nature of Chapter 262, the addition of the pre-conviction preliminary injunction quite plausibly increases the chance that California’s "Son of Sam" statute could be found unconstitutional.

Molly J. Mrowka

Criminal Procedure; presentence custody credits

Penal Code § 1237.1 (new); § 1237 (amended).
AB 354 (Rogan); 1995 STAT. Ch. 18

Existing law permits a defendant to appeal a final judgment of conviction. However, under existing law, a defendant who either entered a plea of guilty or nolo contendere or had probation revoked following an admission of violation, is permitted to appeal only if specified conditions are satisfied.

Chapter 18 creates an additional exception to the general right to appeal.

1. CAL. PENAL CODE § 1237(a) (amended by Chapter 18); see id. (granting a defendant the right to appeal a sentence, an order granting probation, or a commitment on the basis of insanity or as a mentally disordered sex offender or for controlled substance addiction); id. (providing that California Penal Code §§ 1237.1 and 1237.5 are exceptions to California Penal Code § 1237); People v. Vargas, 13 Cal. App. 4th 1653, 1658-59, 17 Cal. Rptr. 2d 445, 448 (1993) (noting that the right to appeal a criminal conviction lies in statutory, not constitutional, law).

2. See BLACK'S LAW DICTIONARY 708 (6th ed. 1990) (defining a "guilty plea" as a formal admission in court, made voluntarily and with the requisite scienter of having committed the criminal act that is being charged); see also CAL. PENAL CODE § 1016 (West 1985) (listing the plea of guilty as one of six possible pleas to an indictment); People v. Robertson, 11 Cal. App. 4th 835, 840, 14 Cal. Rptr. 2d 572, 575 (1992) (holding that prior to an acceptance of a plea of guilty, the defendant must be advised that such plea constitutes a waiver of the right to trial, cross-examination, and the privilege against self-incrimination).

3. See BLACK'S LAW DICTIONARY 1048 (6th ed. 1990) (defining "nolo contendere" by its Latin meaning, "I will not contest it"); see also CAL. PENAL CODE § 1016(3) (West 1985) (defining "nolo contendro" as one of six available pleas to an indictment which has the same effect as a guilty plea in felony cases; however, in non-felony cases, the plea may not be used in any civil suit derived from the criminal prosecution); People v. Stewart 145 Cal. App. 3d 967, 975-76, 193 Cal. Rptr. 799, 803 (1983) (finding that an instruction to the jury which defined "no contest" as the same as a guilty plea was precise and accurate).

4. CAL. PENAL CODE § 1237.5 (West Supp. 1995); see id. § 1237.5(a) (West Supp. 1995) (mandating that a defendant file a written report, under oath, showing reasonable grounds for appeal which concern the legality of the proceedings); id. § 1237.5(b) (West Supp. 1995) (requiring the trial court to issue and file with the county clerk a certificate of probable cause for the appeal); see also id. § 1203.3 (West Supp. 1995) (stating that the court has the authority to revoke probation so long as enumerated notice and due process concerns are addressed).

5. CAL. PENAL CODE § 1237(a) (amended by Chapter 18); see id. (listing California Penal Code §§ 1237.1 and 1237.5 as two exceptions to the general right to appeal a final judgment of conviction); id. § 1237.5 (West Supp. 1995) (granting a defendant who either pled guilty or nolo contendere or had probation revoked to appeal a judgment of conviction only upon the following: (1) the defendant's filing a written
Criminal Procedure

Under Chapter 18, waiver of a defendant's right to appeal a conviction based solely on the grounds of a calculation error in presentence custody credits, is presumed unless the error was raised at the time of sentencing.\(^6\) Also, an appeal based upon errors discovered after sentencing is waived unless the defendant first makes a motion for correction of the trial record.\(^7\)

A defendant is entitled, under existing law, to receive six days of credit for each four days spent in custody while awaiting trial or sentencing.\(^8\)

**COMMENT**

In *People v. Fares*,\(^9\) a California Court of Appeal expressed concern over the use of the appellate process to correct errors in credit for presentence custody, suggested that such issues would be appropriately addressed by correction in trial courts, and noted that only upon a trial court’s failure to correct the error was the appellate process appropriate.\(^10\)

Subsequently, other California Courts of Appeal, relying on *Fares*, either dismissed appeals or remanded to trial court, cases where the sole issue on appeal

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\(^6\) *Id.* § 1237.1 (enacted by Chapter 18).

\(^7\) *Id.*

\(^8\) *Id.* § 4019(f) (West Supp. 1995); see *id.* (declaring that it is the Legislature’s intent to provide those prisoners who receive work performance and good time credits with six days of credit for each four days spent in actual custody); see also *id.* § 2900.5(a) (West Supp. 1995) (providing that if a defendant serves time in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, similar residential institution, or home detention program, prior to sentencing, it is the court’s duty to calculate credit to be applied towards the sentence for days served in presentence custody); *People v. Montalvo*, 128 Cal. App. 3d 57, 62, 183 Cal. Rptr. 242, 244 (1982) (holding that it is the trial court’s responsibility to calculate credits for presentence confinement based upon information provided by the confining entity); *In re Gordon Banks*, 88 Cal. App. 3d 864, 866, 152 Cal. Rptr. 111, 113 (1979) (declaring that under the principles of equal protection and due process, credit must be given for confinement prior to sentencing). *But cf.* IND. CODE ANN. § 35-50-6-3 (West 1986 & Supp. 1994) (stating that persons assigned as Class I earn one day of credit for each day imprisoned, persons designated as Class II earn one day of credit time for every two days imprisoned and those assigned to Class III earn no credit time); *id.* § 35-50-6-4 (West 1986 & Supp. 1994) (declaring that a person who is erroneously imprisoned or who is awaiting trial is initially considered Class I, but may be reassigned Class II or III upon violation of either department of correction or penal facility rules); MISS. CODE ANN. § 99-19-23 (1994) (establishing that a defendant is entitled to credit for time spent in incarceration prior to trial on a criminal charge or while awaiting appeal to any sentence issued); OR. REV. STAT. § 137.320(4) (1990) (stating that a defendant who is imprisoned prior to sentencing will receive credit for the time served). *See generally* People v. Lathrop, 13 Cal. App. 4th 1401, 1404, 16 Cal. Rptr. 2d 830, 833 (1993) (declaring that giving credit for time served in custody prior to sentencing serves to equalize time spent in custody by defendants convicted of the same offense); Wade R. Habeeb, *Annotation, Right to Credit for Time Spent in Custody Prior to Trial or Sentence*, 77 A.L.R. 3d 182 (1977 & Supp. 1995) (discussing the right to credit for pretrial or presentence custody).


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was the calculation of presentence credit.\textsuperscript{11} Chapter 18 was enacted in response to judicial calling and codified recent court holdings.\textsuperscript{12} Prohibiting an appeal by a defendant based solely on an error in the calculation of presentence custody agreements, unless the defendant either raised the issue at the time of sentencing or made a motion for correction of the record in the trial court, will result in increased judicial economy by preventing frivolous suits and allowing appellate courts to hear cases ripe for appellate review.\textsuperscript{13}

\textit{Pamela J. Keeler}

\textbf{Criminal Procedure; prisoners—discipline}

Penal Code § 2933 (amended).
SB 215 (Leonard); 1995 STAT. Ch. 557

Under existing law, the Department of Corrections\textsuperscript{1} may reduce a prisoner's

\begin{itemize}
\item \textbf{See} People v. Salazar, 29 Cal. App. 4th 1550, 1557, 35 Cal. Rptr. 2d 221, 225 (1994) (remanding to the trial court for determination of calculation of presentence custody); People v. Robinson, 25 Cal. App. 4th 1256, 1258, 31 Cal. Rptr. 2d 445, 447 (1994) (recognizing that the inherent power to correct ministerial issues lies with the trial court by dismissing a prisoner's appeal based solely on presentence custody credit); People v. Scott, 17 Cal. App. 4th 1383, 1388, 22 Cal. Rptr. 2d 46, 49 (1993) (declining to address the issue of presentence custody credits as a basis of appeal as the issue is more appropriately addressed at the trial court level, and remanding to the trial court for determination).\textit{But cf.} People v. Guillen, 25 Cal. App. 4th 756, 764, 31 Cal. Rptr. 2d 653, 658 (1994) (distinguishing \textit{Fares} by finding that where the error is merely mathematical, it is far more economical to resolve it at the appellate level; this is particularly true where credit for presentence credit is one of many issues on appeal); People v. Heard, 18 Cal. App. 4th 1025, 1031, 22 Cal. Rptr. 2d 684, 687 (1993) (modifying the level of presentence credit at the appellate level); People v. Little, 19 Cal. App. 4th 449, 452, 23 Cal. Rptr. 2d 394, 395-96 (1993) (correcting an error in presentence custody credit while noting concern with the rising use of the appellate process to resolve appeals based solely on miscalculation of presentence custody credits); \textit{SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 354, at 3} (May 16, 1995) (stating that courts have been reluctant to dismiss appeals based solely on miscalculation of presentence credit). \textit{See generally ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 354, at 1} (Apr. 25, 1995) (recognizing that California appellate court decisions reflect the confusion regarding presentence custody credits).

\item \textbf{ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 354, at 1} (Apr. 25, 1995).

\item \textbf{SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 354, at 2} (May 16, 1995); \textit{see id.} (declaring the purpose of AB 354 to be twofold: (1) to codify developing case law, and (2) to grant judges additional leeway in finding prisoner's claims frivolous); \textit{see also ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 354, at 2} (Apr. 25, 1995) (listing a reduction in frivolous suits by inmates as a potential effect of AB 354).

\item \textbf{See CAL. PENAL CODE § 5001} (West Supp. 1995) (stating that the Director of Corrections and the Prison Industry Authority comprise the Department of Corrections); \textit{see also id.} § 5000 (West Supp. 1995) (providing that the Department of Corrections is included within the Youth and Adult Correctional Agency); \textit{id.} § 5002 (West Supp. 1995) (setting forth the powers and duties of the Department of Corrections).

\end{itemize}
term of imprisonment by awarding goodtime allowances,\(^3\) as well as work-time
credits\(^4\) for a prisoner's performance in work, training, or educational programs
created by the Director\(^5\) of Corrections.\(^5\) Existing law also sets forth the pro

2. See Black's Law Dictionary 694 (6th ed. 1990) (defining “goodtime allowance” as credit
awarded for a prisoner's good conduct which reduces the period of time that the prisoner must serve in prison,
though it does not reduce the length of the prisoner's sentence).

3. See Cal. Penal Code § 2933(b) (amended by Chapter 557) (declaring that work-time credit is a
not a right, but a privilege).

4. See id. § 5050 (West 1982) (creating the office of Director of Corrections); id. § 5051 (West Supp.
1995) (declaring that the Director of Corrections must be appointed by the Governor with the Senate's
consent); id. § 5051.2 (West 1982) (requiring the Director of Corrections to have substantial experience in
administering adult and youth correctional programs); id. § 5053 (West 1982) (stating that the Director of
Corrections will be the chief administrative officer of the Department); id. § 5054 (West 1982) (holding the
Director of Corrections responsible for the supervision, management, control, and treatment of the state
prisons, as well as the persons incarcerated within them); id. §§ 5055-5070 (West 1982 & Supp. 1995) (setting
forth the powers and duties of the Director of Corrections).

5. Id. § 2931(a) (West Supp. 1995); id. § 2933(a) (amended by Chapter 557); see id. § 1170.12(a)(5)
(West Supp. 1995) (providing that an inmate who has been convicted of one or more prior felonies, may not
be awarded credits which exceed 20% of the inmate’s total sentence); id. § 2900.1 (West 1982) (requiring that
the time a prisoner has served for a judgment which is subsequently ruled invalid, be credited to any sentence
later imposed for the same criminal act(s)); id. § 2900.5(a) (West Supp. 1995) (providing that the time a
prisoner serves in custody prior to the imposition of his or her sentence, shall be credited to that sentence);
id. § 2930(a) (West Supp. 1995) (requiring the Department of Corrections to inform every inmate about the
availability of credit within 14 days of that inmate entering a state prison); id. § 2931(b) (West Supp. 1995)
(permitting good-behavior credits to reduce an inmate's sentence by four months for every eight months served
in prison, or at the same rate for any lesser period of time); id. (requiring that three of the eight months served
by the prisoner must be served without any act for which the inmate could be charged with a felony or a
misdeemeanor in a court of law); id. § 2931(c) (West Supp. 1995) (providing that one month of a four-month
reduction must be based purely on the inmate’s participation in work, educational, vocational, or other prison
activities); id. § 2933(a) (amended by Chapter 557) (permitting a prisoner to receive work-time credits for
performance in work assignments or educational programs); id. (allowing an inmate to receive a six-month
reduction in his or her sentence for every six-months of full-time participation in a credit qualifying program);
id. § 2933.1(a) (West Supp. 1995) (preventing any inmate convicted of a violent felony from accruing work-
time credit in excess of 15% of that inmate’s total sentence); id. § 2933.5(a), (b) (West Supp. 1995) (listing
various offenses which will preclude a person convicted of one of these infractions from receiving credit);
id. § 2933.6(a) (West Supp. 1995) (declaring that any inmate confined to a Security Housing Unit or an
Administration Segregation Unit for misconduct is ineligible to receive any credit during the period the inmate
is confined in these units); id. § 2934 (West Supp. 1995) (allowing an inmate to waive the right to receive
credits for good-behavior while retaining the right to acquire work-time credits); id. § 2935 (West Supp. 1995)
(authorizing the Director of Corrections to grant up to an additional 12 months of credit time to any inmate who
performs a heroic act or provides exceptional assistance in maintaining the security of the prison); id. § 4019(d)
(West Supp. 1995) (providing that an inmate’s sentence may be reduced one day for every six days served in
a city or county jail, industrial farm, or a road camp for the satisfactory performance of labor); see also In re
Dayan, 231 Cal. App. 3d 184, 187, 282 Cal. Rptr. 269, 271 (1991) (finding that prisoners who receive a
determinate sentence are eligible for conduct credits); In re Carter, 199 Cal. App. 3d 271, 276, 244 Cal. Rptr.
648, 651 (1988) (holding that petitioner was entitled to receive work-time credits for a work program he was
assigned to, but was prevented from participating for four weeks because of delays on the part of the prison’s
authorities); In re Jackson, 182 Cal. App. 3d 439, 443, 227 Cal. Rptr. 303, 306 (1986) (ruling that the petitioner
was entitled to receive good-time credit to reduce his sentence even though he had only been sentenced to a
10-day jail term to be served on weekends); People v. Cruz, 163 Cal. App. 3d 648, 652, 211 Cal. Rptr. 512,
514 (1985) (stating that a mentally disordered sex offender was entitled to good-time credits for the period of
time the petitioner spent in a hospital facility); People v. Valladares, 162 Cal. App. 3d 312, 321, 208 Cal. Rptr.
604, 609 (1985) (holding that the statutory provisions allowing inmates in the state prisons to earn six months
of credit for six months of work did not violate the equal protection rights of those detainees who were
ineligible to participate in these work programs); People v. Caruso, 161 Cal. App. 3d 13, 19, 207 Cal. Rptr.
221, 226 (1984) (declaring that work-time credits are employed as a means of rehabilitating prisoners); People
cedures under which a prisoner may forfeit work-time credits or have forfeited credits restored.  

v. Salvidar, 154 Cal. App. 3d 111, 115, 201 Cal. Rptr. 60, 62 (1984) (ruling that a juvenile sent to a state prison following an unsuccessful commitment to the Youth Authority is not entitled to good-time credits; but a juvenile sent to a state prison following a 90-day diagnostic evaluation at the Youth Authority was entitled to credit); 70 Op. Cal. Att'y Gen. 49 (1987) (concluding that prisoners who are serving life terms are not eligible to receive work-time credits which are available under California Penal Code § 2933); cf. ARIZ. REV. STAT. ANN. § 41-1604.07(A) (Supp. 1994) (allowing an inmate to earn one day of release credit for every six days served); MICH. COMP. LAWS ANN. § 800.33(2) (West Supp. 1995) (permitting an inmate to receive more credit days per month than the longer the inmate is incarcerated); MONT. CODE ANN. § 53-30-105(1) (1993) (setting forth the monthly good-time credits which may be awarded to the various classifications of prisoners); N.Y. CORRECT. LAW § 230(4) (McKinney 1987) (preventing an inmate from accumulating more than two months of credit for each year of the inmate's maximum sentence, or from accumulating enough credit to reduce the time actually served by the inmate to a period less than the imposed minimum sentence). See generally James B. Jacobs, Sentencing by Prison Personnel: Good Time, 30 UCLA L. REV. 217 (1982) (examining whether the policy of awarding inmates good-time credits is necessary); Victor S. Sze, Comment, A Tale of Three Strikes: Slogan Triumphs Over Substance as Our Bumper-Sticker Mentality Comes Home to Roost, 28 LOY. L.A. L. REV. 1047, 1090-91 (1995) (examining whether California's Three-Strike law violates a prisoner's rights guaranteed by the California Constitution by denying them the opportunity to acquire good-time credits); Daniel M. Weintraub, Wilson Approves Limits on Inmates Earning Early Release, L.A. TIMES, Sept. 22, 1994, at A18 (discussing how California Governor Pete Wilson signed legislation prohibiting inmates convicted of a violent felony from reducing their sentence by more than 15% through good-behavior credits).

6. CAL. PENAL CODE § 2932(a) (West Supp. 1995); id. § 2932(c) (amended by Chapter 557); see id. § 2932(a)(1) (West Supp. 1995) (listing violent activities which will result in an inmate forfeiting up to one year of credit); id. § 2932(a)(2) (West Supp. 1995) (providing that any misconduct punishable as a felony, other than those acts listed in California Penal Code § 2932(a)(1), may result in up to 180 days of credit being forfeited by the inmate regardless of whether the inmate is prosecuted for the infraction); id. § 2932(a)(3) (West Supp. 1995) (specifying that a prisoner may forfeit up to 90 days of credit for any act which is punishable as a misdemeanor); id. § 2932(a)(4) (West Supp. 1995) (stating that a prisoner may forfeit up to 30 days of credit for any serious disciplinary infraction); id. (permitting an inmate to be denied a credit qualifying assignment for up to six months if the Director finds that the inmate poses a dangerous risk to staff or other inmates); id. § 2932(c)(1)(A) (West Supp. 1995) (requiring the Department of Corrections to provide an inmate with a written notice within 15 days of discovering information of an act by the inmate which can result in the forfeiture of all or any of the inmate's credits); id. (providing that a hearing concerning the prisoner's loss of credit must occur within 30 days of the written notice); id. § 2932(c)(1)(B) (West Supp. 1995) (listing factors which will allow the Department of Corrections to delay the written notice to the inmate beyond the 15-day period); id. § 2932(c) (West Supp. 1995) (requiring every prisoner to be notified as to how much credit the inmate may earn as well as the inmate's expected time-credit release date); id. § 2933(c) (amended by Chapter 557) (requiring a period of up to one year to pass, during which the prisoner does not commit an additional infraction, before forfeited credits may be restored); CAL. CODE REGS. tit. 15, § 3043.2(c) (1995) (providing that an inmate shall not be denied or have to forfeit any work credit for failure to participate in a work program because of certain circumstances beyond the inmate's control); see also People v. Johnson, 120 Cal. App. 3d 808, 815, 175 Cal. Rptr. 59, 63 (1981) (declaring that the sheriff or the prosecution bore the burden of proving that a defendant, who had escaped, was not entitled to work-time credits in determining his sentence); cf. ARIZ. REV. STAT. ANN. § 41-1604.07(C) (Supp. 1994) (stating that a prisoner will forfeit any or all of his or her earned release credits for violating a prison rule or showing a continuous unwillingness to participate in work, educational, treatment, or training programs); id. § 41-1604.07(G) (Supp. 1994) (setting forth various activities which will result in a prisoner forfeiting five days of release credit); MICH. COMP. LAWS ANN. § 800.33(6) (West Supp. 1995) (providing that a prisoner will not be awarded any good time credits for any month during which the prisoner has committed a major misconduct); MISS. CODE ANN. § 47-5-138(2) (1993) (declaring that an inmate may forfeit all or a part of any earned time credits for committing a serious rules violation); id. § 47-5-139(3) (1993) (allowing an inmate's credits, which have been forfeited a result of an escape by the inmate, to be restored if the inmate voluntarily, and without expense to the state, returns to the institution without having committed a felonious crime while a fugitive); MONT. CODE ANN. § 53-30-105(2) (1993) (stating that a prisoner who escapes or attempts to escape, may forfeit all or a part of good-time credits that the prisoner has accumulated); VA. CODE ANN. § 53.1-189(A) (Michie Supp. 1994) (providing that an inmate may forfeit all
Criminal Procedure

In addition, existing law states that under certain circumstances, the Department of Corrections may not restore forfeited work-time credits beyond a specified amount, and is prevented from restoring work-time credits which have been forfeited as a result of a serious disciplinary infraction by the prisoner where the victim dies or is permanently disabled.  

Chapter 557 provides that where work-time credits have been forfeited for a serious disciplinary infraction punishable by the forfeiture of more than ninety days of credit, the Director of Corrections may restore the forfeited credits at his or her discretion.

COMMENT

The policy of reducing prison sentences by awarding good-behavior or work-time credits serves two goals: First, it encourages prisoners to behave in a cooperative fashion in return for a reduced sentence, and second, by allowing for the early release of inmates, the problems of prison overcrowding are significantly reduced.

However, proponents of Chapter 557 were concerned that prisoners, knowing that any credits forfeited could be easily restored under the prior law, would have

or a part of his or her accumulated good conduct credits as a result of violating any written prison rule or regulation).

7. CAL. PENAL CODE § 2933(c) (amended by Chapter 557); see id. (providing that the Department of Corrections is prevented from restoring up to 180 forfeited credit days of an inmate who had committed an act which could be prosecuted as a felony); id. (providing the Department of Corrections from restoring up to 90 days of credit forfeited by an inmate for conspiring or attempting to commit acts which could be prosecuted as felonies).

8. Id. § 2933(c) (amended by Chapter 557); cf. ARIZ. REV. STAT. ANN. § 41-1604.07(C) (Supp. 1994) (permitting the Director of Corrections, at his or her discretion, to restore any release credits which have been forfeited by an inmate); MICH. COMP. LAWS ANN. § 800.33(10) (West Supp. 1995) (authorizing a warden to restore any credits which have been forfeited by a prisoner as a reward for the inmate's subsequent good conduct); VA. CODE ANN. § 53.1-189(C) (Michie Supp. 1994) (providing that only the Director of Corrections is authorized to restore any good conduct credits which have been forfeited by an inmate).

9. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 215, at 3 (Apr. 4, 1995); see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 215, at 2 (July 11, 1995) (noting that correctional officers have traditionally felt that a credit mechanism is imperative for maintaining order within the prison system as well as keeping the prison population at a manageable level). See generally Andy Furillo, Plan to Pack Prisons Raises Fears of Riots, Wilson May Add 20,244 to Cramped Facilities, SACRAMENTO BEE, Jan. 20, 1995, at A1 (quoting a Department of Corrections official as estimating that California's prison system was operating at 180% of capacity); Peter Hecht, Nonviolent '3rd Strike' Adds Heat to the Debate: 25-to-Life Too Harsh, Initiative Critics Say, SACRAMENTO BEE, Sept. 26, 1994, at A1 (predicting that the California prison population, 126,000 in 1994, will increase to 233,000 by the year 2000). But see ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 215, at 2 (July 11, 1995) (observing that there is a large group of citizens who believe that good-behavior/work credit is a fraud perpetrated on the public since prisoners rarely serve their sentences in full thanks to early release through the credit program); SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 215, at 3 (Apr. 4, 1995) (stating that supporters of SB 215 believe that the credit mechanism loses its effectiveness in maintaining order if forfeited credits are easily restored); Jacobs, supra note 5, at 258-59 (arguing that alternative methods, such as segregating prisoners who have violated rules, are more effective in controlling prisoner discipline than awarding good-time credits).
less incentive to obey prison regulations since they could still be awarded an early release despite disciplinary infractions.\textsuperscript{10}

Chapter 557 is intended to ensure that the forfeiture of any good-behavior or work-time credit will deter prisoner misconduct within the prison system by making the restoration of forfeited credits discretionary rather than automatic.\textsuperscript{11}

\textit{A. James Kachmar}

\textbf{Criminal Procedure; prisoners—notice of release}

\textbf{Penal Code § 3058.7 (new).} \\
\textbf{SB 561 (Mountjoy); 1995 STAT. Ch. 936}

Existing law requires the Board of Prison Terms\textsuperscript{1} or the Department of Corrections\textsuperscript{2} to provide written notice of the release of a prisoner convicted of a violent felony\textsuperscript{3} to the sheriff or the chief of police having jurisdiction over the

\textsuperscript{10} \textit{Assembly Floor, Committee Analysis of SB 215, at 2 (July 31, 1995); see Senate Committee on Appropriations, Committee Analysis of SB 215, at 1 (May 25, 1995) (reporting that in 1994, inmates forfeited about 2.6 million days of credit, of which 1.3 million were subsequently restored); Senate Committee on Appropriations, Committee Analysis of SB 215, at 2 (May 8, 1995) (noting that inmates in 1994, lost 962,804 days of credit as a result of felony offenses of which 278,494 days were reinstated); Senate Committee on Criminal Procedure, Committee Analysis of SB 215, at 2 (Apr. 4, 1995) (observing that infractions for which prisoners were disciplined included attempted murder, arson, attempted escape, and extortion).}

\textsuperscript{11} \textit{Senate Rules Committee, Committee Analysis of SB 215, at 2 (June 1, 1995). But see Senate Committee on Appropriations, Committee Analysis of SB 215, at 2 (May 1, 1995) (estimating that the 278,494 credit days restored in 1994 for felony offenses, saved the state about $16 million); Senate Committee on Criminal Procedure, Committee Analysis of SB 215, at 3 (Apr. 4, 1995) (observing that opponents of SB 215 were concerned that precluding restoration of credits would result in greater disciplinary problems and exacerbate prison overcrowding by delaying prisoner releases); id. at 4 (predicting that by reducing the amount of credits granted, a fiscal burden will be imposed on California which the state is in no position to endure); id. (arguing that the correctional policy pursued by SB 215 is counterproductive since reducing the amount of credits granted will increase prison terms, already lengthier than those of comparable jurisdictions, which will not justify the increased financial obligations); see also Mary L. Vellinga, \textit{Guards Hit Jackpot with Overtime Pay: Many Nearly Double Their Incomes by Gaining Hours}, SACRAMENTO BEE, Apr. 23, 1995, at A15 (reporting that the state's annual prison budget has increased 1141% from $300 million in 1980 to a projected $3.7 billion in 1995-6). See \textit{generally} Jacobs, supra note 5, at 270 (stating that although the policy of awarding good-time credits should be abolished, it is important to limit the types of violations for which credits may be forfeited as well as the amount of credits which may be forfeited if the system is to be retained and be effective).
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community in which the felon is scheduled to be released. Existing law also requires the Board of Prison Terms and the Department of Corrections to notify each witness and victim, or next of kin, who has requested a notice of the felon's pending release.

Chapter 936 authorizes the sheriff or chief of police to notify any person deemed appropriate by the sheriff or chief of police of the release of a violent felon. Chapter 936 further provides that the law enforcement official providing notification, and the public agency or entity employing the law enforcement official, will not be liable for providing or failing to provide such notice.

COMMENT

The purpose of Chapter 936 is to provide the sheriff or the chief of police

4. Id. § 3058.6 (West Supp. 1995); see id. (requiring notification of a felon's release to the District Attorney having jurisdiction over the community in which the inmate is scheduled to be released).
5. See id. § 1878 (West 1983) (defining "witness" as a person whose testimony is received as evidence); see also id. § 136(2) (West 1988) (describing a witness as a person possessing information regarding a crime, whose testimony under oath is received as evidence, who reported the crime, or who has been subpoenaed by the court).
6. See id. § 136(1) (West 1988) (defining "victim" as a person with respect to whom a crime has been perpetrated or attempted to be perpetrated).
7. Id. § 3058.8 (West Supp. 1995); see id. (requiring that notification to the witness, victim(s), or the victim's next of kin be provided pursuant to California Penal Code § 679.03); see also id. § 679.03 (West Supp. 1995) (requiring the county district attorney, probation department, and the victim witness coordinator to confer and establish a policy on which agency will inform a witness, victim, or victim's next of kin of the right to obtain information regarding the violent felon's release).
8. Id. § 3058.7(a) (enacted by Chapter 936); cf. id. § 646.9(k)(1) (West Supp. 1995) (requiring the Department of Corrections, county sheriff, or director of the local department of correction to provide notice of a stalker's pending release to a victim or witness). See generally Mark E. Bellamy, Review of Selected 1994 California Legislation, 26 PAC. L.J., 202, 248 (1995) (discussing the requirements for the Department of Corrections or county sheriff to notify victims, family members of such victim, or a witness to the crime); Pamela Keefer & Mark Myers, Child Protection Act of 1994: Child Molester Identification Line, VICTIMS NEWS & VIEWS (1995) (copy on file with the Pacific Law Journal) (discussing public notification of a released sex offender under New Jersey law, and the 900 number to which the public can call to determine if a person is a registered sex offender in California).
9. CAL. PENAL CODE § 3058.7(b) (enacted by Chapter 936); see CAL. GOV'T CODE § 820.4 (West 1980) (immunizing a public employee from liability arising from acts or omissions in the exercise or enforcement of any law, except for false arrest or imprisonment); id. § 845 (West Supp. 1995) (providing that a public employee or entity is not liable for failing to provide sufficient protective service); see also Thompson v. County of Alameda, 27 Cal. 3d 741, 756-57, 614 P.2d 728, 737, 167 Cal. Rptr. 70, 79 (1980) (holding that a county agency releasing an individual that threatened to kill a child in his neighborhood, but not indicating a specific child, is not liable for failing to notify the neighborhood of releasing the individual). But see Wallace v. City of Los Angeles, 12 Cal. App. 4th 1385, 1397, 16 Cal. Rptr. 2d 113, 121 (1993) (ruling that the police department owed a duty to a witness of the danger that the defendant posed to the witness because of the peril of the witness and because the police requested the witness' assistance; thus, the police were not immune from liability to the witness); Carpenter v. City of Los Angeles, 230 Cal. App. 3d 923, 931, 281 Cal. Rptr. 500, 503 (1991) (finding that the city, through its police department, owes a duty to warn a witness that the defendant has threatened the witness' life, and that the city did not enjoy any statutory immunity). See generally DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989) (holding that the state is not required to provide its citizens with an affirmative right to police protection); Raucci v. Town of Rotterdam, 902 F.2d 1050, 1056-58 (2d Cir. 1990) (concluding that the police department established a special relationship with the victims and therefore owed them a duty of protection from their abuser).

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with authority to notify anyone deemed necessary of the pending release of a violent felon. Therefore, Chapter 936 attempts to achieve the goal of providing public safety. However, there is concern that public notification will lead to vigilantism.

In addition, Chapter 936 raises concerns regarding its ability to withstand constitutional scrutiny.

**EX POST FACTO CLAUSE**

First, Chapter 936 may be subject to legal challenges based on the prohibition

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10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 561, at 2 (July 11, 1995); see id. (noting that current law does not provide legal authority to notify elected officials or their communities when violent felons are released into their communities on parole, even though murderers, child molesters, rapists and others with violent tendencies are regularly released into unsuspecting neighborhoods); see also CAL. PENAL CODE § 3058.8 (West Supp. 1995) (requiring the Board of Prison Terms to provide the sheriff and the chief of police information with respect to the pending release of a violent felon in their community).

11. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS ON SB 561, at 3 (Apr. 25, 1995); see id. (stating that the originally proposed bill, which required notification by the sheriff or chief of police to the local legislature, was in response to inconsistent notice to the community of a pending release of a violent felon by the California Department of Corrections); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 561, at 2 (July 11, 1995) (noting that SB 561 allows a police chief to notify schools and day care centers about child molesters being released into the community). See generally Michelle P. Jerusalem, Note, A Framework for Post-Sentence Sex Offender Legislation: Perspective on Prevention, Registration, and the Public's "Right" to Know, 48 VAND. L. REV. 219, 231-32 (1995) (commenting that the policy goal of criminal legislation is to prevent repeat offenses and to protect society from harm, and discussing state statutes regarding these goals); Jenny A. Montana, Note, An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law, 3 J.L. & POL'Y 569, 569-74 (1995) (discussing public demand leading to Washington's and New Jersey's law regarding public notification of the release of a sex offender into a community in order to protect the general public from the released offender).

12. See Jerusalem, supra note 11, at 230 (stating that public notification statutes are not intended to be scarlet letter provisions so as to punish by public humiliation, but to provide public protection); see also Julia A. Houston, Note, Sex Offenders Registration Acts: An Added Dimension to the War on Crime, 28 GA. L. REV. 729, 745 (1994) (asserting that public notification provisions allow a community to be aware of a dangerous offender's presence and adjust its activities accordingly). But see Montana, supra note 11, at 574 (contending that public notification of a convicted sex offender will not prevent offenders from reoffending); id. (claiming that public notification of sex offenders only provides a false sense of security because most offenses are committed by a family member or acquaintance).

13. Montana, supra note 11, at 575-78; see id. at 575-76 (noting that even the most level-headed of citizens will have difficulty remaining calm when they discover that a convicted sex offender is living within their neighborhood); see also Houston, supra note 12, at 745 (commenting that public notification provisions create the possibility that communities will use social pressures to ostracize and exclude people who already have served their time for their crimes).

14. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 132, at 5-6 (Apr. 25, 1995); see id. (indicating that there could be claims of unconstitutionality regarding ex post facto and bill of attainder); Jerusalem, supra note 11, at 241 (noting that arguments can be made that public notification statutes are unconstitutional); Recent Legislation: Criminal Law—Sex Offender Statute Notification, 108 HARV. L. REV. 787, 791 (1995) (suggesting that several commentators raise constitutional objections to notification statutes on behalf of convicted offenders). See generally Keeler & Myers, supra note 8 (discussing the constitutionality of public notification and the use of a 900 number in California to identify registered sex offenders).
against ex post facto laws.\textsuperscript{15} In \textit{Calder v. Bull},\textsuperscript{16} the United States Supreme Court held that the ex post facto clause prohibited certain categories of law from being applied.\textsuperscript{17} Under federal case law, the pertinent \textit{Calder}-category for evaluation is that category which prohibits laws that alter punishment for a certain offense by inflicting greater punishment than was originally attached to the crime when it was initially committed.\textsuperscript{18}

Once the legislative act is determined to fall within one of the categories prohibited by the ex post facto clause, a determination needs to be made whether the legislative aim was to punish that individual for past activities, or if the restriction comes about as a relevant incident to a regulation of a present situation.\textsuperscript{19} If there is uncertainty regarding whether a statute is punitive or regulatory, a court must apply the factors set forth in \textit{Kennedy v. Mendoza-Martinez}\textsuperscript{20} to determine if the statute violates the prohibitions of ex post facto laws.\textsuperscript{21}

To date, there have only been a few challenges to public notification statutes.\textsuperscript{22} In \textit{Artway v. Attorney General},\textsuperscript{23} the district court held that the public

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\textsuperscript{15} Senate Committee on Criminal Procedure, Committee Analysis of SB 561, at 5-6 (Apr. 25, 1995); see id. (questioning whether public notification would be unconstitutional in its retroactive application); see also U.S. Const. art 1, § 9, cl. 3, § 10, cl. 1 (prohibiting the application of ex post facto laws); CAL. CONST. art. 1, § 9 (mandating that ex post facto law will not be applied).

\textsuperscript{16} 3 U.S. 386 (1978).

\textsuperscript{17} \textit{Calder}, 3 U.S. at 390; see id. (setting forth the categories of law prohibited by the ex post facto clause as every law that: (1) makes action committed before the passing of the law, and which was innocent when committed, criminal, and punishes such action; (2) aggravates a crime, or makes it a greater crime than it was when committed; (3) changes the punishment, and inflicts a greater punishment than attached to the crime when committed; and (4) alters the legal rules of evidence, and receives less, or different testimony than the law required at the time the offense was committed in order to convict the criminal); see also Collins v. Younigblood, 497 U.S. 37, 46-52 (1990) (overruling cases subsequent to \textit{Calder} that expanded the categories of ex post facto laws, and reinstating the holding of \textit{Calder} as the meaning of the ex post facto clause).

\textsuperscript{18} \textit{Artway v. Attorney General}, 876 F. Supp. 666, 672 (D.N.J. 1995); see id. (declaring that this category is the only category relevant for analysis in determining whether New Jersey's sex offender registration and possible public notification provision violates the ex post facto clause); Houston, supra note 12, at 758 (asserting that this category of \textit{Calder} is applicable to sex offender registration acts).

\textsuperscript{19} \textit{Artway}, 876 F. Supp. at 672; see id. (quoting De Veau v. Braisted, 363 U.S. 144, 160 (1960), in which the court held that if the legislation has a clear punitive purpose the court should apply the ex post facto analysis); see also United States v. Ward, 448 U.S. 242, 248-49 (1980) (holding that if the statute does not have a clear punitive purpose, then the court must determine if the statute or its scheme is punitive by nature, even though the legislature declared the legislation regulatory in purpose).

\textsuperscript{20} 372 U.S. 144 (1963).

\textsuperscript{21} Houston, supra note 12, at 758-59; see \textit{Artway}, 876 F. Supp. at 673 (holding that the court must focus on the practical purpose and effect of the statute and reach an independent conclusion as to the statute's true nature); see also \textit{Kennedy}, 372 U.S. at 168-69 (setting forth a non-exclusive list of factors for determining if legislation is punitive or regulatory, including an assessment of whether the sanction (1) involves an affirmative disability or restraint, (2) historically has been regarded as a punishment, (3) comes into play only on a finding of scienter, (4) promotes the traditional aims of punishment—retribution and deterrence, (5) is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable, and (7) appears excessive in relation to the alternative program); id. (noting that the factors are relevant, but that they are not to be construed as a strict checklist).

\textsuperscript{22} Jerusalem, supra note 11, at 241 n.146; see id. (noting that only recently have Washington and Louisiana heard challenges to public notification statutes).

\textsuperscript{23} 876 F. Supp. 666 (D.N.J. 1995).
notification requirements under New Jersey law violated constitutional ex post facto laws.\textsuperscript{24} In \textit{State v. Babin},\textsuperscript{25} the Louisiana appellate court held that the statute violated ex post facto provisions of both state and federal law.\textsuperscript{26} However, in \textit{State v. Ward},\textsuperscript{27} the Washington Supreme Court held that the statute did not constitute punishment and thus did not violate ex post facto laws.\textsuperscript{28}

Whether Chapter 936 withstands an ex post facto challenge rests on whether it is deemed a punishment.\textsuperscript{29} In \textit{In re Reed},\textsuperscript{30} the California Supreme Court held that requiring sex offender registration alone imposed a punishment.\textsuperscript{31} Therefore, there is an indication that Chapter 936 will be deemed a punishment and thus would be unconstitutional.\textsuperscript{32} However, there is the possibility that the California Supreme Court will follow \textit{Ward} and determine that Chapter 936 furthers a regulatory function rather than a punitive function.\textsuperscript{33}

**Cruel and Unusual Punishment**

Chapter 936 may also be constitutionally violative if it is determined to be cruel and unusual punishment.\textsuperscript{34} In assessing whether a statute imposes a cruel and unusual punishment, the court must first determine if the statute is cate-

\begin{itemize}
\item 24. \textit{Artway}, 876 F. Supp. 692; \textit{see id.} (finding that in application of the \textit{Kennedy} factors to public notification concerning the release of a sex offender, the act is an excessive intrusion into the realm of punishment because its effect, if not its purpose, is punitive); \textit{id.} (indicating that the \textit{Kennedy} factors determine that the statute being punitive outweighs the stated legislative intent of public protection and facilitating law enforcement investigation of sex crimes).
\item 26. \textit{Babin}, 637 So. 2d at 824; \textit{see id.} (holding that because the criminal acts occurred from January of 1989 through February 1992, and the statute was enacted August 21, 1992, the defendant could not be found to have offended the special conditions).
\item 27. 869 P.2d 1062 (Wash. 1994).
\item 28. \textit{Ward}, 869 P.2d at 1072-74; \textit{see id.} (indicating that appropriate dissemination of relevant and necessary information does not constitute punishment for purposes of ex post facto analysis, and that public stigma does not arise out of public notification concerning a conviction because any stigma that may exist arises from private reactions to crime by members of the general public).
\item 29. \textit{Houston}, \textit{supra} note 12, at 758; \textit{see De Veau}, 363 U.S. at 160 (holding that the question in each ex post facto analysis is whether the legislative aim was to punish the individual for prior conduct); \textit{Ward}, 869 P.2d at 1068 (indicating that ex post facto prohibitions apply only to laws inflicting criminal punishment).
\item 30. 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).
\item 31. \textit{Reed}, 33 Cal. 3d at 922, 663 P.2d at 220, 119 Cal. Rptr. at 662.
\item 32. See \textit{Houston}, \textit{supra} note 12, at 751 n.135 (suggesting that if registration alone constitutes punishment, then registration combined with public notification is an even greater punishment); \textit{see also People v. Adams}, 581 N.E.2d 637, 641 (III. 1991) (indicating that public notification provisions are more intrusive than mere registration).
\item 33. \textit{See Ward}, 869 P.2d at 1072-74 (indicating that the appropriate dissemination of relevant and necessary information does not constitute punishment for purposes of ex post facto analysis, and that public stigma does not arise out of public notification concerning a conviction because any stigma that may exist arises from private reactions to crime by members of the general public).
\item 34. \textit{See Jerusalem}, \textit{supra} note 11, at 241-42 (asserting that cruel and unusual punishment arguments against public notification statutes will be more effective than the arguments against registration statutes); \textit{see also U.S. CONST.} amend. VIII (mandating that cruel and unusual punishment shall not be inflicted); \textit{CAL. CONST.} art. 1, § 17 (declaring that no cruel and unusual punishment may be inflicted or excessive fine imposed).
\end{itemize}
orized as punishment. Unlike, the determination of punishment or regulation under ex post facto, courts have utilized various tests under the cruel and unusual punishment analysis. Some courts utilized the Kennedy factors to determine if the statute was a punishment. Other courts utilize the "punishment" test of Trop v. Dulles to determine if the law was penal.

Once the court has determined the statute is a punishment, the court must decide if the punishment is cruel and unusual. State courts relied on the proportionality test of Solem v. Helm to determine if a punishment was cruel and unusual. However, in Harmelin v. Michigan, the Supreme Court voted to overrule the proportionality test even though the Court lacked a majority opinion in the application of a new test.

35. Houston, supra note 12, at 748; see Artway, 876 F. Supp. at 678 (indicating that the court must focus on whether the registration act passed by the New Jersey Legislature may be deemed punishment).

36. Houston, supra note 12, at 748.

37. Id.; see Reed, 33 Cal. 3d at 920-22, 663 P.2d at 218-20, 191 Cal. Rptr. at 660-62 (applying the Kennedy test, and concluding that the Sex Offender Registration Act imposed a punishment); see also Jerusalem, supra note 11, at 243 n.154 (asserting that arguments can be made for public notification as was made in In re Reed about sex offender registration laws being a punishment, and that notification appears to be excessive in relation to its intended goal of public safety).


39. Houston, supra note 12, at 749-50; see People v. Adams, 555 N.E.2d 761, 764-65 (Ill. App. Ct. 1990), aff'd, 581 N.E.2d 607 (Ill. 1991) (rejecting the Kennedy test in favor of the Trop test because the punishment was invoked after an adjudication of guilt, and thus raises a cruel and unusual punishment issue under Trop, rather than a due process issue under Kennedy); id. at 765 (holding that the purpose of the statute was to aid law enforcement officials in protecting children from sex offenses, which made it regulatory rather than penal, and would fundamentally outweigh any punitive effect). But see Jerusalem, supra note 11, at 242-43 n.153 (noting the Trop court's assertion that the Eighth Amendment draws its meaning from an evolving standard of decency that marks the progress of a maturing society, and commenting that the standard of decency has changed so that public humiliation is considered decent). See generally Trop, 356 U.S. at 96 (holding that the court should look to the purpose behind the statute, and if the statute imposes a disability for the purposes of punishment, it is penal, but if it imposes a disability for some other legitimate governmental purpose, it is nonpenal); id. at 100 (stating that the concept underlying the prohibition of cruel and unusual punishment concerns nothing less than a person's dignity).

40. Houston, supra note 12, at 752.


42. See Solem, 463 U.S. at 290-92 (establishing a three-prong test to determine if the punishment is proportional to the offense to include: (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the same commission of the same crime in other jurisdictions); see also Reed, 33 Cal. 3d at 923-26, 663 P.2d at 220-22, 119 Cal. Rptr. at 662-65 (applying a proportionality test similar to Solem and holding that a statute requiring registration for lewd or dissolute conduct imposed cruel and unusual punishment); id. at 924-25, 663 P.2d at 220-21, 119 Cal. Rptr. at 662 (basing the California Supreme Court's decision on the fact that the misdemeanor offender posed no danger to society—this type of action victimized no one in the criminal sense—and that more serious sex-related misdemeanors did not require registration); Adams, 581 N.E.2d at 641 (holding that registration statutes are constitutional under the three-prong test of Solem because the acts were not punishment under cruel and unusual punishment, and even if a punishment, it would not be cruel and unusual); id. (indicating that if registration was a public record, then the offender might bear a greater burden and possibly cause a different result).


44. Harmelin, 501 U.S. at 965 (Scalia, J., plurality opinion); see id. (holding that Solem was wrongly decided because the Eighth Amendment does not guarantee proportionality); id. at 1001 (Kennedy, J., concurring) (finding that the Eighth Amendment does not require strict proportionality between crime sentences, but forbids only extreme sentences that are grossly disproportionate to the crime). But see id.
As indicated above under ex post facto, the courts may determine that Chapter 936 imposes a punishment. The dilemma that occurs, though, is in determining which cruel and unusual punishment analysis is appropriate. Under the Solem test, Chapter 936 could be found unconstitutional. Under the Harmelin analysis, however, a finding of unconstitutionality is highly unlikely. Thus, the validity of Chapter 936 will most likely depend upon which test is applied.

RIGHT TO PRIVACY

Chapter 936 could further face a challenge invoking the constitutional right to privacy. In Griswold v. Connecticut, the Supreme Court held that several guarantees of the Bill of Rights protect privacy interests, creating a "penumbra" or "zone" of privacy. The Supreme Court subsequently expanded this fundamental right to privacy in cases of abortion and contraceptives. In Whalen v.

1021, 1027-28 (White, J., dissenting) (arguing that the Solem decision should be upheld because there is no justification for overruling); id. at 1027 (Marshall, J., dissenting) (agreeing with Justice White, but maintaining further that capital punishment should always be unconstitutional); id. at 1028 (Stevens, J., dissenting) (concurring with Justice White, but adding an additional comment because the sentence imposed here—life in prison for the third offense of writing a fraudulent check—was too capricious).

45. See Artway, 876 F. Supp. at 692 (holding that the application of the Kennedy factors indicate that the sex offender registration and public notification statute is punitive and that the factors outweigh the Legislature's stated intent of being regulatory). But see Ward, 869 P.2d at 1072 (holding that the dissemination of relevant and necessary information does not constitute punishment).

46. Artway, 876 F. Supp. at 678; see id. (indicating that what is clear from Harmelin is that clarity is now lacking as to which application of Eighth Amendment scrutiny appropriately applies to this legislation).

47. See Houston, supra note 12, at 755-56 (asserting that under the Adams rationale, a statute that provides for public release of registration information would stigmatize the defendant and possibly make the statute unconstitutional); see also Adams, 581 N.E.2d at 641 (finding that if the registration was public record, then there would be a greater burden on the offender and a stigma attached, and possibly a different result would occur).

48. See Houston, supra note 12, at 755-56 (asserting that a statute providing for public release of registration information might be deemed stigmatizing the defendant, but such a ruling is unlikely under the Harmelin test, except for possibly under a capital punishment case); see also Harmelin, 501 U.S. at 999-1001 (holding that outside capital punishment cases, successful challenges to the proportionality of sentences are exceedingly rare because courts should grant substantial deference to the authority of legislators to determine punishments).

49. See Jerusalem, supra note 11, at 244 (indicating that a registration of sex offender statutes could face a constitutional challenge with respect to the right to privacy).

50. 361 U.S. 479 (1965).

51. Griswold, 381 U.S. at 483-85; see id. at 484 (finding the constitutional guarantees to privacy under the First, Third, Fourth, Fifth, and Ninth Amendments have a penumbra, formed by emanations of those guarantees that help give them life and substance).

52. Jerusalem, supra note 11, at 244; see Roe v. Wade, 410 U.S. 113, 152-53 (1973) (indicating the areas of personal autonomy that deserve constitutional protection under the right to privacy as activities relating to marriage, procreation, contraception, family relationships, child rearing, and education); Eisenstadt v. Baird, 405 U.S. 438, 447-55 (1972) (holding that an unmarried couple can gain access to contraceptive devices because it is the right of the individual to be free from unwarranted governmental intrusions into matters fundamentally affective a person). See generally Roe, 410 U.S. at 153-56 (holding that right to privacy protects a woman's decision whether to abort a fetus, and that privacy can only be impaired by the statutes that are narrowly drawn and justified by a compelling state interest).
Roe, the Supreme Court acknowledged that the right of privacy may include an interest to avoid disclosure of personal matters and to independently make certain kinds of important decisions.

If a claim is made asserting that Chapter 936 denies a violent felon privacy rights that other convicted felons enjoy, a broad reading of Paul v. Davis suggests the claim would be unsuccessful. In addition, Chapter 936 may withstand a constitutional challenge regarding privacy because of the enormous state interest in protecting the public, but there is a possibility that Chapter 936 is not drawn narrowly enough to overcome the individual’s right to privacy.

BILL OF ATTAINDER

Finally, Chapter 936 could constitute a bill of attainder. To determine if a statute is punitive within the context of the bill of attainder doctrine, the Supreme Court has set forth three relevant tests. However, the second, or functional test, is the relevant test necessary to determine punitive effect regarding public

54. Whalen, 429 U.S. at 598-600. But see id. at 598-604 (holding that a state interest in gathering data on persons using prescription drugs outweighed the individual's privacy interest); Paul v. Davis, 424 U.S. 693, 701-14 (1976) (holding that a person does not have a constitutional right of protecting one's reputation and that the right of privacy does not prevent a state from publicizing a record of an official act like an arrest).
56. Houston, supra note 12, at 764. But see People v. Hove, 7 Cal. App. 4th 1003, 1006-07 n.7, 9 Cal. Rptr. 2d 295, 297 n.7 (1992) (rejecting a privacy claim of a convicted drug possessor who was required to register with local police, but noting that registration was designed to minimize the intrusion into an individual's privacy in that the information was not open to the public).
57. See Jerusalem, supra note 11, at 244-45 (asserting that the courts will probably accept public safety as a compelling interest, but that it is less likely that the courts will find that the statute is drawn narrowly enough to accomplish the goal of public safety because of the compelling argument that notification does not add to public safety); see also National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (recognizing the state's compelling interest in public safety over privacy interests in administering drug tests for certain government employees).
58. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 561, at 6 (Apr. 25, 1995); see U.S. CONST. art. I, § 9, cl. 3, § 10 (declaring that no bill of attainder shall be passed); CAL. CONST. art. I, § 9 (prohibiting passage of a bill of attainder); see also BLACK'S LAW DICTIONARY 165 (6th ed. 1990) (defining "bill of attainder" as legislative acts that apply to an individual or an ascertainable group in such a way as to inflict punishment without a judicial trial). See generally Fletcher v. Peck, 10 U.S. 87, 137-38 (1810) (explaining that the bill of attainder and ex post facto clauses were enacted because the Framers of the Constitution viewed with apprehension the violent acts which might grow out of the feelings of the moment, and they, as a precautionary measure, enacted these clauses in order to protect themselves and their property from the effect of those sudden and strong passions).
59. Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 475-78 (1977); see id. (setting forth the tests for determining punitive effect under the bill of attainder analysis as: (1) the historical test concerning whether the punishment was traditionally judged to be prohibited by the bill of attainder clause; (2) the functional test, which analyzes whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes; and (3) the motivational test, which examines whether the legislature intended the statute to be punitive).
notification statutes.\textsuperscript{60} In New Jersey, a federal district court held that the Bill of Attainder Clause does not invalidate the provisions regarding sex offender registration and public notification.\textsuperscript{61}

Therefore, the constitutionality of Chapter 936 depends on the judicial determination of whether the statute is punitive under the Bill of Attainder Clause.\textsuperscript{62} As determined by \textit{Artway}, the historical test is inapplicable because laws traditionally banned by the test do not have any of the effects, potential or actual, that public notification poses.\textsuperscript{63} However, the California courts will probably find that the Legislature intended Chapter 936 to be punitive in effect.\textsuperscript{64} Under the motivational test, the California courts could follow \textit{Artway} and find that Chapter 936 can reasonably further a non-punitive legislative purpose of furthering law enforcement interests and protecting society.\textsuperscript{65} However, California may determine that public notification does not further the non-punitive purpose of societal protection.\textsuperscript{66}

\textbf{CONCLUSION}

Chapter 936 may encounter constitutional challenges, but the burden is upon the challenger to establish its unconstitutionality.\textsuperscript{67} However, the constitutionality of Chapter 936 is uncertain since there is no clear precedent from the United States Supreme Court, the inconsistent holdings from other jurisdictions, and the

\textsuperscript{60} \textit{Artway}, 876 F. Supp. at 684; \textit{see id.} (stating that the court must look at the functional test in cases of sex offender registration and public notification statutes because the historical test has no application traditionally and the third test will have already been litigated under the ex post facto and cruel and unusual punishment challenges).

\textsuperscript{61} \textit{Id.}, \textit{see id.} (recognizing that although the statute does appear detrimental to a specific group, sex offender registrants, the Supreme Court, in \textit{Nixon}, 433 U.S. at 469-72, held that some detrimental effect is tolerable as long as the limited scope of a law is connected to and explained by the problem the Legislature seeks to address); \textit{id.} (finding the fact that the Legislature enacted the law in response to public outrage over a brutal killing of a child is not fatal to the act because it is not aimed at one group and further law enforcement's interest and the protection of society).

\textsuperscript{62} \textit{See In re McMullen}, 989 F.2d 603, 617 (2nd Cir. 1993) (noting that the toughest determination is whether the act is punitive rather than whether the act affects specific individuals or is conducted without a judicial trial).

\textsuperscript{63} \textit{Artway}, 869 F. Supp. at 684.

\textsuperscript{64} \textit{See Houston, supra} note 12, at 751 n.133 (asserting that if the California Supreme Court found that sex offender registration imposed a stigma on the defendant, then the registration combined with public notification would certainly create a greater stigma).

\textsuperscript{65} \textit{See Artway}, 869 F. Supp. at 684 (finding that the apparent purpose of the statute was to further law enforcement interests and protect society through the reduction of recidivism by informed policing, heightened public awareness, and vigilance, and thus the counterbalances of the Bill of Attainder Clause do not invalidate the statute).

\textsuperscript{66} \textit{See Montana, supra} note 11, at 574-75 (contending that public notification of a convicted sex offender will not prevent offenders from reoffending); \textit{see also id.} at 591-94 (claiming that public notification of a sex offender will not prevent offenders from reoffending and only provides the public a false sense of security because most offenses are committed by a family member or acquaintance).

\textsuperscript{67} \textit{See Artway}, 876 F. Supp. at 685 (recognizing the broad powers of the legislature in protecting the public, but indicating the Court must not lose sight of its function to protect the constitutional rights of the minority or individual).
lack of a clear indication of the proper application of Eighth Amendment scrutiny. There is an indication that California will find Chapter 936 punitive under ex post facto analysis. However, there is probably no cruel and usual punishment violation given the holding of *Harmelin*. In addition, there might not be a violation of privacy since the state’s interest in protecting the public and facilitating law enforcement’s interest will outweigh the individual’s privacy interest, but there might be concern regarding whether Chapter 936 is drawn narrowly enough.

*Chad D. Bernard*

**Criminal Procedure; probation costs—determination of defendant’s ability to pay**

Penal Code § 1203.1b (amended).  
AB 594 (Boland); 1995 *STAT. Ch.* 36

Under prior law, a probation officer could only make a recommendation to the court as to the defendant’s ability to pay all or part of the costs of activities such as probation supervision, conducting certain investigations and preparing reports, and processing requests for interstate compact supervision, which the state’s interest in protecting the public and facilitating law enforcement’s interest will outweigh the individual’s privacy interest, but there might be concern regarding whether Chapter 936 is drawn narrowly enough.

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68. Houston, *supra* note 12, at 755-56; see *Harmelin*, 501 U.S. at 999-1001 (holding that, other than capital punishment cases, challenges to the proportionality of sentences will typically be unsuccessful because courts should give substantial deference to legislators to determine punishments).

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1. See CAL. PENAL CODE § 830.5 (West Supp. 1995) (setting forth the powers and duties of probation officers); id. § 1203.5 (West Supp. 1995) (creating the offices of adult probation officer, assistant and deputy probation officers); see also CAL. CIV. PROC. CODE § 131.4 (West 1982) (allowing the probation officer to designate a deputy probation officer to perform his or her duties).

2. See CAL. PENAL CODE § 1203.1b(e) (amended by Chapter 36) (defining “ability to pay” as the defendant’s overall capability of repaying the costs associated with the defendant’s probation); id. § 1203.1b(e)(1)-(4) (amended by Chapter 36) (listing some factors the courts may consider in determining the defendant’s ability to pay, such as the present financial position of the defendant, his or her reasonably discernible future financial position, the likelihood the defendant will be employed, and any other factors bearing on the defendant’s ability to pay).

3. See id. § 1203.1b(a) (amended by Chapter 36) (providing that the costs of probation supervision not to exceed the average costs for these services).


5. See CAL. PENAL CODE § 1203(b)(1) (West Supp. 1995) (requiring the probation officer to make a report to the court, before the sentencing of the defendant, concerning the circumstances surrounding the crime, as well as the defendant’s prior history and record); id. § 1203(b)(2)(A) (West Supp. 1995) (mandating that probation officers include a recommendation as to whether the defendant should be granted or denied probation in the report); id. § 1203(b)(2)(C)(i), (ii) (West Supp. 1995) (requiring probation officers to recommend whether a defendant should be ordered to pay restitution); id. § 1203(b)(2)(D) (West Supp. 1995) (providing

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court could accept if the defendant agreed with the recommendation. 6 Prior law also provided that the defendant was entitled to a hearing before the court if the defendant did not agree with the probation officer's recommendation. 7

Chapter 36 grants the probation officer 8 the authority to make a determination as to the defendant's ability to pay the costs associated with probation. 9 Chapter 36 also requires the probation officer to inform the defendant that the defendant may agree to a court hearing, which includes the right to counsel, 10 to determine

that the probation officer must make the report available to the prosecuting and defending attorneys at least five days before the hearing; see also CAL. CIV. PROC. CODE § 131.5 (West 1982) (providing that the court shall not sentence a defendant until a copy of the probation report has been given to the court); 24 Op. Cal. Att'y Gen. 219, 221 (1954) (stating that the report concerning a defendant prepared by the probation officer does not become part of the public record until it is filed with the court clerk).

6. 1993 Cal. Legis. Serv. ch. 502, sec. 1, at 2191-92 (amending CAL. PENAL CODE § 1203.1b(a)); see CAL. CIV. PROC. CODE § 131.3 (West 1982) (providing that a probation officer will conduct an inquiry into the background of a defendant when so ordered by the court and must report the findings to the court); CAL. PENAL CODE §§ 11175-11177.2 (West 1992 & Supp. 1995) (authorizing the court to permit a defendant to serve the conditions of the defendant's probation outside of the state); see also id. § 1203.1b(f) (amended by Chapter 36) (providing that the defendant may petition the court during the probationary period to modify or vacate the court's determination as to the defendant's ability to pay); id. § 1203.1b(g) (amended by Chapter 36) (allocating all sums paid by the defendant for the operating expenses of the county probation department); People v. Phillips, 25 Cal. App. 4th 62, 70, 30 Cal. Rptr. 2d 321, 325 (1994) (concluding that although the court may hold a separate hearing in order to determine the defendant's ability to pay the costs of probation, a separate hearing is not required); People v. Montano, 6 Cal. App. 4th 118, 123, 8 Cal. Rptr. 2d 136, 139 (1992) (holding that a court cannot order a defendant to pay the costs of preparing probation reports where the defendant is denied probation); People v. Adams, 224 Cal. App. 3d 705, 712, 274 Cal. Rptr. 94, 99 (1990) (ruling that the court could not impose probation fees on a defendant until a hearing had been held to determine the defendant's ability to pay); People v. Wilson, 130 Cal. App. 3d 264, 268, 181 Cal. Rptr. 658, 660 (1982) (holding that a court may make the determination as to the defendant's ability to pay only after probation has been granted). See generally 22 CAL. JUR. 3d Criminal Law § 3448 (1985 & Supp. 1995) (providing an overview of the process by which a court can order a defendant to pay for the costs of probation).

7. 1993 Cal. Legis. Serv. ch. 502, sec. 1, at 2191-92 (amending CAL. PENAL CODE § 1203.1b(b)); see CAL. PENAL CODE § 1203.1b(b)(4) (amended by Chapter 36) (requiring the court to state on the record its reasons for any determination of the defendant's ability to pay that differs from the probation officer's determination).

8. See CAL. PENAL CODE § 1203.1b(a) (amended by Chapter 36) (providing that the probation officer may authorize a representative to make the determination as to the defendant's ability to pay).

9. Id.; see id. (authorizing the probation department to establish a payment schedule for the reimbursement of preplea or presentence investigations); cf. FLA. STAT. ANN. § 948.09(7) (West Supp. 1995) (authorizing the Department of Corrections to establish a payment schedule for parolees of all court-ordered costs but requiring that any victim restitution payment take precedence over the other fees); KY. REV. STAT. ANN. § 439.315(6)(a), (b) (Baldwin 1994) (allowing the Department of Corrections to petition the relasing authority to waive the parole supervision fee of any offender who is a student or has an employment disability); N.C. GEN. STAT. § 15A-1374(c) (Supp. 1994) (permitting a parole commission to exempt a parolee from paying a monthly parole supervision fee if the commission determines that the fee would constitute a severe economic burden to the parolee); S.C. CODE ANN. § 24-21-80 (Law. Co-op. Supp. 1994) (requiring the Department of Corrections to determine a parolee's ability to pay a parole supervision fee); TENN. CODE ANN. § 40-28-201(a)(2) (1990) (requiring the Board of Paroles to make an investigation into a parolee's financial circumstances).

10. See CAL. CONST. art. I, § 15 (granting defendants in a criminal trial the right to have the assistance of counsel); CAL. PENAL CODE § 686(2) (West 1985) (entitling defendants in criminal actions to defend in person and with counsel); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (concluding that in order for a waiver of counsel to be effective, there must be "an intentional relinquishment or abandonment of a known right or privilege"); People v. Spencer, 153 Cal. App. 3d 931, 940, 200 Cal. Rptr. 693, 698 (1984) (holding that a defendant's waiver of the right to counsel must be made voluntarily and knowingly with a sufficient
the defendant's ability to pay. In addition, Chapter 36 provides that the defendant may waive the right to a determination by the court by a knowing and intelligent waiver.

Under existing law, the defendant's reasonably discernible future financial position is to be considered in determining the defendant's ability to pay. Prior law prohibited the court from considering a period of more than six months when determining the defendant's future financial position. Chapter 36 allows the court to consider a period of up to one year from the date of the hearing for the purpose of determining the defendant's future financial position.

Prior law also allowed a county's board of supervisors to charge a fee, payable in installments, not to exceed thirty-five dollars for the processing of installment payments to the probation department. Chapter 36 raises the maximum chargeable amount to fifty dollars.

awareness as to the probable consequences of the waiver); People v. Paradise, 108 Cal. App. 3d 364, 369, 166 Cal. Rptr. 484, 487 (1980) (ruling that a defendant bears the burden of proving that a waiver of the right to counsel was not made knowingly and voluntarily with an awareness of the risks involved).

11. CAL. PENAL CODE § 1203.1b(a) (amended by Chapter 36); see id. § 1203.1b(b)(1) (amended by Chapter 36) (stating that the defendant has the right to present and confront witnesses and evidence during the hearing to determine the defendant's ability to pay); id. § 1203.1b(b)(3) (amended by Chapter 36) (requiring the court to consider any fine or restitution imposed on the defendant in determining the defendant's ability to pay); see also People v. Poindexter, 210 Cal. App. 3d 803, 810, 258 Cal. Rptr. 680, 684 (1989) (finding that the trial court's failure to allow the defendant to call and confront witnesses at the hearing was an additional ground for striking the order requiring the defendant to pay the costs of his probation reports and attorney fees); People v. Ryan, 203 Cal. App. 3d 189, 198-99, 249 Cal. Rptr. 750, 756 (1988) (holding that the trial court did not err in determining the defendant's ability to pay restitution as a probation condition without holding a hearing since the defendant conceded that he had the ability to pay).

12. CAL. PENAL CODE § 1203.1b(a) (amended by Chapter 36); see id. § 1203.1b(b) (amended by Chapter 36) (providing that the court will determine the defendant's repayment schedule if the defendant fails to waive the right of having the court determine the defendant's ability to pay); see also People v. Vargas, 13 Cal. App. 4th 1653, 1662, 17 Cal. Rptr. 2d 445, 450 (1993) (finding that the determination as to whether a waiver of a right is valid depends upon the circumstances surrounding a particular case, including the defendant's background, experience, and conduct); People v. Longwith, 125 Cal. App. 3d 400, 413, 178 Cal. Rptr. 136, 143 (1981) (interpreting the intelligence requirement for a valid waiver to mean whether the defendant was aware of the consequences of the waiver, not whether the waiver was intelligent in relation to an experienced attorney's trial tactic). See generally 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, Trial § 2803 (2d ed. 1989) (stating the general rule is that a waiver will be good if the defendant understands the nature of the act).

13. CAL. PENAL CODE § 1203.1b(c)(2) (amended by Chapter 36).


15. CAL. PENAL CODE § 1203.1b(e)(2) (amended by Chapter 36); cf. id. § 987.8(g)(2) (West Supp. 1995) (preventing a court from considering a period of more than six months from the date of a hearing in determining a defendant's ability to pay the full costs of legal assistance); id. § 1209(b) (West 1982) (providing that a court, in determining a defendant's ability to pay the costs for the administration of a work furlough program, may not consider a period beyond six months from the date of the hearing); CAL. VEH. CODE § 42003(d)(2) (West Supp. 1995) (specifying that a court may only consider a six-month period from the date of the hearing to determine a person's ability to pay traffic fines, restitution, and any probation costs).

16. See CAL. PENAL CODE § 1203.1b(h) (amended by Chapter 36) (providing that the processing fee cannot exceed the administrative and clerical costs associated with receiving the payments).

17. 1993 Cal. Legis. Serv. ch. 158, sec. 19, at 1203-04 (enacting CAL. PENAL CODE § 1203.1b(e)).

18. CAL. PENAL CODE § 1203.1b(h) (amended by Chapter 36); cf. FLA. STAT. ANN. § 948.09(1)(a)(2)(b) (West Supp. 1995) (requiring a person placed on misdemeanor probation to pay at least $40 a month to provide for probation supervision); KY. REV. STAT. ANN. § 439.315(2)(a), (b) (Baldwin 1994) (specifying that the fees
Chapter 36 was enacted to help relieve the courts' workload in setting the costs of a parolee's probation by streamlining the process. The increase in the monthly fees that can be charged to cover the costs of a defendant's probation was also needed to help deal with the increasing costs of probation supervision. Chapter 36 also helps to reduce the chance that a defendant may receive a windfall at the probation department's expense by lengthening the period the court may consider in determining the defendant's ability to pay.

A. James Kachmar
Criminal Procedure

Criminal Procedure; statutory limitation for the prosecution of select crimes

Penal Code § 801.5 (amended).
SB 734 (Marks); 1995 STAT. Ch. 704

Existing law provides general time limitations in which a criminal case must be prosecuted. In conjunction with these limitations, prior law mandated that prosecution for certain specified crimes concerning false or fraudulent insurance claims must be commenced within three years after the discovery of the commission of the offense.2

Chapter 704 requires that these crimes now be prosecuted within four years after the discovery of the commission of the offense or within four years after the offense has been completed, whichever is the longest period of time.3 However, this limitation only pertains to these crimes when the offense is punishable by a prison term in the state prison and a material element of the crime is fraud.4

1. CAL. PENAL CODE § 801 (West 1985); see id. (requiring prosecution for an offense that can carry a prison term in the state prison to be brought within three years after the occurrence of the offense except as provided in California Penal Code §§ 799 and 800); see also id. § 799 (West Supp. 1995) (permitting prosecution at any time of crimes that can be punished by death, a life imprisonment term without parole, or crimes concerning the embezzlement of public money); id. § 800 (West 1985) (mandating prosecution of a crime that can be punished by eight years or more in the state prison, within six years after the commission of the offense, except as set forth in California Penal Code § 799).
2. 1994 Cal. Legis. Serv. ch. 1031, sec. 3, at 5218-19 (amending CAL. PENAL CODE § 801.5); see id. (stating that prosecutions for California Penal Code § 550, former California Insurance Code § 1871.1, or California Insurance Code § 1871.4, must be initiated within three years after the discovery of the commission of the offense); See also CAL. INS. CODE § 1871.4 (West Supp. 1995) (providing a detailed list of unlawful acts concerning false and fraudulent claims); CAL. PENAL CODE § 550 (West Supp. 1995) (setting forth a long list of unlawful acts related to insurance claims); 1991 Cal. Legis. Serv. ch. 1008, sec. 2, at 4088-89 (amending CAL. INS. CODE § 1871.1) (setting forth a similar list to that found in California Penal Code § 550, which is the prior section to the current one now codified as California Penal Code § 1871.1).
3. CAL. PENAL CODE § 801.5 (amended by Chapter 704).
4. See CAL. CIV. CODE § 1572 (West 1982) (declaring that "actual fraud" is considered as any of the following acts done by a party to a contract or with his or her consent, with the purpose to deceive another party, or to induce that other party to enter into the contract: (1) a statement, as a fact, which is not true, by a person who does not believe that it is true; (2) a positive assertion, in a manner without adequate grounds by the knowledge of the person making it, of that which is false, though he or she believes the statement to be true; (3) the concealment of something which is true; or (4) a promise made disregarding any intent to honor it; or (5) any other act that is committed to deceive another); Hale v. Wolfsen, 276 Cal. App. 2d 285, 291, 81 Cal. Rptr. 23, 28 (1969) (announcing that a fraudulent representation can be either expressly or impliedly made and can arise from silence or nonDisclosure); Ach v. Finkelstein, 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472, 477 (1968) (determining that the elements of actionable fraud are (1) an untrue representation, that is actual or implied, or the hiding of a matter of fact that is crucial to the transaction that is made falsely; (2) the individual making the representation is aware of the falsity or a representation does that which is false; (3) the intent to induce another person into relying upon the representation; (4) reliance by one who should naturally rely upon the representation; and (5) damage results); Pearson v. Norton, 230 Cal. App. 2d 1, 7, 40 Cal. Rptr. 634, 638 (1964) (stating that the concept of fraud in its broad and general sense encompasses anything which has a purpose to deceive, which includes all statements, acts, omissions, and concealments that involve a breach of a legal or equitable duty, trust, or confidence which results in damage to another who justifiably relies upon the representation).
breach of a fiduciary duty, or the crime is based upon misconduct by a public employee, officer, or appointee while in office. What follows is a list of crimes, though not all encompassing, specifically affected by Chapter 704.

**CRIMES AT COMMON LAW**

Chapter 704 affects grand theft of any kind, forgery, falsification of public

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5. See Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (discussing the definition of "fiduciary duty," and determining that a fiduciary duty is something that goes beyond every day relations, and that normal standards of conduct would be considered unacceptable in a fiduciary relationship); id. (stating that not honesty alone, but a scrupulous adherence to honor, is the standard in a fiduciary relationship, and that uncompromising rigidity is the attitude held by courts when called upon to attack this standard); see also Rippey v. Denver U. S. Nat'l Bank, 273 F. Supp. 718, 737 (D. Colo. 1967) (holding that a trustee in a fiduciary relationship owes his allegiance to the beneficiaries first, and thus, all other options are secondary and noting the accepted standard as defined in Meinhard); BLACK'S LAW DICTIONARY 625 (6th ed. 1990) (defining "fiduciary duty" as the obligation to act for the benefit of another, while placing one's own interests behind those of the other person, and stating that it is the strictest duty of care that can be implied by the law); Daniel B. Bogart, Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back—Something May Be Gaining On You," 68 AM. BANKR. L.J. 155, 209 (1994) (asserting that a non-willful breach of a fiduciary duty is a simple negligent action); Deborah A. Demott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1986 DUKE L.J. 879, 882 (believing that the fiduciary's duties do not consist only of acting honest and fair, but additionally require that the fiduciary act in furtherance of the beneficiary's interest).


7. See id. § 24000 (West Supp. 1995) (enumerating a long list of county officers).


9. CAL. PENAL CODE § 801.5 (amended by Chapter 704); see id. (directing one's attention to California Penal Code § 803(c) which limits the scope of Chapter 704 since California Penal Code § 803(c) only applies to the crimes it enumerates); see also CAL. GOV'T CODE § 3000 (West 1980) (stating that any public officer or employee loses his or her position upon conviction of any crime specified in the California Constitution or the laws of California); id. § 71180(a) (West Supp. 1995) (discussing the appointment of judges); cf. ALA. CODE § 15-3-3 (1982) (stating that a prosecution for conversion of the state or county revenue must begin within six years after the conversion); id. § 15-3-5(a)(6)-(7) (Supp. 1994) (providing that the crimes of forgery and counterfeiting have no statute of limitation); ARK. CODE ANN. § 5-1-109(c)(1) (Michie 1993) (declaring that even though the general statute of limitation has expired, prosecution can still commence within one year after an offense concerning either fraud or breach of a fiduciary obligation is discovered or should reasonably have been discovered); id. § 5-1-109(c)(2) (Michie 1993) (increasing the statute of limitations by up to ten years for any offense that is concealed concerning felonious conduct in office by a public servant); GA. CODE ANN. § 17-3-2(3)-(4) (Michie 1990) (excluding the crimes of conversion of public property by a public officer or employee and conversion of property by a trustee from a beneficiary, from Georgia's general statute of limitations law); MISS. CODE ANN. § 99-1-5 (1994) (excluding a list of enumerated crimes, including forgery, counterfeiting, larceny, embezzlement, and obtaining money or property under false pretenses, from any period of limitation); N.Y. CRIM. PROC. LAW § 30.10(3)(a) (McKinney 1992) (allowing for a prosecution for larceny committed by a person in violation of a fiduciary duty to be commenced within one year after discovery of the offense, or within one year after the offense should have been reasonably discovered); id. § 30.10(3)(b) (McKinney 1992) (permitting prosecution to commence against a public official involving misconduct in office during anytime that person is in office, and allowing a maximum five year extension of the general statute of limitations, after the person leaves office).

10. CAL. PENAL CODE § 801.5 (amended by Chapter 704); see id. (stating that California Penal Code § 801.5 affects those crimes set forth within California Penal Code § 803(c)).

11. See id. § 487 (West Supp. 1995) (setting forth instances when grand theft is considered to be committed); People v. Felsman, 257 Cal. App. 2d 437, 442, 64 Cal. Rptr. 870, 873 (1967) (stating that larceny amounting to grand theft can be committed by "trick" or "device"); People v. Schwenker, 191 Cal. App. 2d 670

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records,13 and the acceptance of any type of bribe14 by a public official or employee.15

CRIMES RELATED TO LITIGATION AND PROSECUTION

Chapter 704 affects the presentation of false claims,16 the crime of perjury,17 the falsification of one’s affidavit,18 the offering of false evidence into trial or any similar proceeding,19 and the preparation of false evidence.20

46, 50, 12 Cal. Rptr. 408, 410 (1961) (providing that “grand theft” includes the crimes of embezzlement, larceny, larceny by device and trick, and acquiring property under false pretenses). 12. See CAL. PENAL CODE § 470(a) (West Supp. 1995) (defining a “forger” as any person who, with the purpose to defraud, signs the name of another individual, or a person who does not exist, with the knowledge that he or she does not have the power to do so, or falsely alters, forges, counterfeits, or makes any item listed in California Penal Code § 470); People v. Battle, 188 Cal. App. 2d 627, 631, 10 Cal. Rptr. 525, 528 (1961) (stating that the elements of forgery are (1) the passing of a counterfeit and forged item, knowing that it was such; (2) the person’s name that is allegedly forged is a real person; (3) his or her name as signed to the item was not his or her signature; and (4) that signature was placed upon the document without that person’s permission); see also People v. Cooper, 83 Cal. App. 3d 121, 127, 147 Cal. Rptr. 705, 707 (1978) (stating that to constitute forgery pursuant to California Penal Code § 470, the following factors must be present: (1) The item must be attempted to be passed on as a real and genuine document; (2) it must be within the knowledge of the individual passing the item off that he or she is passing on a forged, altered, counterfeited, or false item; and (3) it must be passed on with the purpose of prejudicing, damaging, or defrauding another individual); People v. Neder, 16 Cal. App. 3d 846, 852-53, 94 Cal. Rptr. 364, 367 (1971) (stating that the crime of forgery is concerned with the means of the act and not the ends).

13. See CAL. PENAL CODE § 115(a) (West 1988) (making a crime of any forged document, known to be forged by the person passing it on, being filed or recorded under any law of the state of California).

14. See id. § 7(6) (West 1988) (defining the term “bribe” as meaning anything of value or advantage that exists or will exist, or any type of promise or undertaking to be given away, asked, or accepted, with an unlawful purpose to influence the individual to whom it is given, in his or her opinion, vote, or action, in any type of public or official capacity); id. § 68 (West 1988) (making it a crime for any public employee or officer to ask or receive any type of bribe); see also People v. Silver, 75 Cal. App. 2d 1, 4, 170 P.2d 80, 81 (1946) (stating that California Penal Code § 7(6) should be read in conjunction with California Penal Code § 68 when that provision is invoked).

15. CAL. PENAL CODE § 801.5 (amended by Chapter 704); id. § 803(c)(1) (West Supp. 1995).


17. See CAL. PENAL CODE § 118(a) (West Supp. 1995) (defining “perjury” as any false statement, that is a material matter, made by a person which that person knows is false, under oath in any instance when such an oath may be administered by the law of the state of California); People v. Smith, 248 Cal. App. 2d 134, 136, 56 Cal. Rptr. 258, 259 (1967) (stating that California Penal Code § 118 is the general perjury statute and is simply a reflection of the common law offense that makes it a felony to intentionally state under oath as true statements known by the presenter to be false).

18. See CAL. PENAL CODE § 118a (West 1988) (establishing the crime of perjury for any person who in any affidavit taken before an individual authorized to record such, states as true any type of material matter which he or she knows to be false); People v. Teixeira, 59 Cal. App. 598, 602, 211 P. 470, 472 (1922) (finding that before a person can be convicted of perjury in creating a false affidavit, that person must either use the affidavit for a goal contemplated by California Penal Code § 118, or present it to another for such use).

19. See CAL. PENAL CODE § 132 (West 1988) (making it a crime to offer into evidence anything that is false); People v. Pereira, 207 Cal. App. 3d 1057, 1068, 255 Cal. Rptr. 285, 292 (1989) (concluding that California Penal Code § 132 applies to every person, not just subjects of an investigation or the parties to a civil
Criminal Procedure

CALIFORNIA CORPORATIONS CODE

Chapter 704 affects willful and fraudulent violations of the California Corporations Code.21

CALIFORNIA GOVERNMENT CODE

Chapter 704 covers situations in which public officials or employees become financially interested in a contract that is made by them in their official capacity, or by any public organization of which they are a part.22 Also, Chapter 704 affects instances when a person purchases or acts upon any transaction that concerns an estate that is dispensed by any public administrator.23

WELFARE FRAUD

Chapter 704 applies to situations in which a person obtains aid for a child who in fact is not entitled to such aid.24 Further, Chapter 704 applies to situations

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20. CAL. PENAL CODE § 801.5 (amended by Chapter 704); id. § 803(c)(2) (West Supp. 1995); see id. § 134 (West 1988) (making it a crime for an individual to prepare false evidence); People v. Horowitz, 70 Cal. App. 2d 675, 702, 161 P.2d 833, 848 (1945) (stating that California Penal Code § 134 requires the finding of a specific intent); see also People v. Blaydon, 154 Cal. App. 2d 817, 823, 317 P.2d 24, 29 (1957) (stating that the corpus delicti of preparing false evidence was met by evidence that the body of will was in the accused's handwriting, that witnesses' signature was forged, that the accused gave the instrument to a lawyer for probate, and that the defendant filed the will with the county clerk for probate).


22. CAL. PENAL CODE § 801.5 (amended by Chapter 704); id. § 803(c)(4) (West Supp. 1995); see CAL. GOV'T CODE § 1090 (West 1980) (mandating that no public official shall be interested in any contract made by them in their official capacity); Thomson v. Call, 38 Cal. 3d 633, 648, 699 P.2d 316, 325, 214 Cal. Rptr. 139, 148 (1985) (stating that the purpose of § 1090 of the California Government Code is to avoid tempting public officers or employees into entering contracts for their personal benefit and to assure the public that employees or officials are giving their undivided attention to public work); id. at 646 n.15, 699 P.2d at 323 n.15, 214 Cal. Rptr. at 146 n.15 (noting that a contract in which a public officer or employee is interested in is not merely voidable, but is absolutely void).


24. CAL. PENAL CODE § 801.5 (amended by Chapter 704); id. § 803(c)(5) (West Supp. 1995); see CAL. WELF. & INST. CODE § 11483 (West 1991) (discussing the crime of obtaining aid by fraud); see also People v. Williams, 106 Cal. App. 3d 15, 21, 164 Cal. Rptr. 767, 770-71 (1980) (stating that California Welfare and Institutions Code § 11483 was created to ensure that a case-by-case determination is made as to whether the state's interest can be adequately served by acquiring restitution or by also instituting a criminal prosecution, and to protect the accused by allowing that person a chance to make restitution in instances where there exists
in which a person fraudulently presents information to obtain services or merchandise to which he or she is not entitled.25

FRAUDS AND MEDICAL RECORDS

Chapter 704 covers instances where an individual fraudulently sells, uses, or falsifies any document that concerns a license, diploma, or certificate entitling a person to practice medicine in the state of California.26

FALSIFICATION OF DOCUMENTS

Chapter 704 applies to the procurement, selling, or sale of deceptive identification documents.27 Finally, Chapter 704 affects instances where a person procures or sells a false certificate of birth or baptism.28

COMMENT

The California Senate Criminal Procedure Committee recently conducted hearings concerning white collar crime and recognized that investigations into these crimes require more time as compared to other crimes.29 The one year

mitigating circumstances); People v. Faubus, 48 Cal. App. 3d 1, 5, 121 Cal. Rptr. 167, 169 (1975) (holding that an intent to defraud in the sense of an intent to induce the victim, by an untrue representation, to part with a valuable knowing that the person would not do so but for the untrue representation, is an element of the offense described in California Welfare and Institutions Code § 11483).

25. CAL. PENAL CODE § 801.5 (amended by Chapter 704); id. § 803(c)(5) (West Supp. 1995); see CAL. WELF. & INST. CODE § 14107 (West 1991) (discussing the crime of fraudulently obtaining services or merchandise); People v. Gregory, 217 Cal. App. 3d 665, 676 n.5, 266 Cal. Rptr. 527, 533 n.5 (1990) (noting that although California Welfare and Institutions Code § 14107 provides three ways that the statute may be violated, it creates only one criminal offense, not many different crimes), cert. denied, 498 U.S. 1014 (1990).

26. CAL. PENAL CODE § 801.5 (amended by Chapter 704); id. § 803(c)(7) (West Supp. 1995); see CAL. BUS. & PROF. CODE §§ 580-584 (West 1990) (discussing various crimes concerning falsification and forgery of documents); see also People v. Reddick, 176 Cal. App. 2d 806, 816, 1 Cal Rptr. 767, 773 (1959) (stating that the term "certificate" as used in California Business and Professions Code §580 is synonymous with the term license), appeal dismissed, 364 U.S. 445 (1959).


28. CAL. PENAL CODE § 801.5 (amended by Chapter 704); id. § 803(c)(10) (West Supp. 1995); see id. § 529a (West 1988) (making it a crime to manufacture or sell false certificates of birth or baptism). See generally 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, Defenses § 374 (2d ed. 1988) (discussing California Penal Code § 529a in the context of statutes of limitations); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, Crimes Against Property § 757 (2d ed. 1988) (discussing the crime of manufacturing or selling of false certificates of birth or baptism).

29. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 734, at 2 (May 9, 1995); Mark D. Harmon, Suite Justice? Not When It Involves Really Big White-Collar Crimes, ARIZ. REPUBLIC, June 22, 1995, at B5 (stating that the problem of white collar crime is huge and that in 1993, the FBI was
statute of limitations extension is narrowly crafted by Chapter 704 so that only specific white collar crimes will be affected—thus leaving all other crimes unchanged.\textsuperscript{30}

The sponsor of Chapter 704 believes that the complexity of white collar crime does not arise simply from the numerous amounts of documents that must be examined in a case, but rather from the fact that many of these crimes are committed in such a way that they are foil proof.\textsuperscript{31} Considering this, more time is needed to prosecute these crimes, while the fear of these cases losing their timeliness is minimal.\textsuperscript{32}

\textit{Matthew E. Farmer}

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\textsuperscript{30} \textit{SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 734, at 2 (May 9, 1995)}; \textit{see CAL. PENAL CODE \textsuperscript{\textregistered} 801.5 (amended by Chapter 704) (applying its provision only to those crimes listed in \textsuperscript{\textregistered} 803 of the California Penal Code).}

\textsuperscript{31} \textit{SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 734, at 2 (May 9, 1995)}; \textit{see id. at 4 (recognizing that the limitation provided in SB 734 may be arbitrary, but believing that it imposes an outside limit in recognition of the staleness problem); id. (suggesting that crimes of fraud or breach of fiduciary duty rarely rely upon the memory of human witnesses, but rather rely upon documentary proof, and thus, the threat of loss and misidentification of evidence is minimal in white collar crime cases); id. (stating that should a case arise where staleness is a factor, a defendant's constitutional rights to due process and a speedy trial remain).
Criminal Procedure

Criminal Procedure; white collar crimes—preservation of property or assets

Penal Code § 186.11 (new).
SB 950 (Killea); 1995 STAT. Ch. 794

Existing law provides that it is illegal for any person to engage in unfair business practices. Existing law subjects any person conducting unfair business practices to a civil penalty and requires him or her to render restitution to the victim. Chapter 794 provides that if any person who commits two or more related

1. CAL. BUS. & PROF. CODE § 17200 (West Supp. 1995); see id. (defining “unfair competition” as including any unlawful, unfair or fraudulent business act or practice, and unfair deceptive, untrue, or misleading advertising); see also Samura v. Kaiser Found. Health Plan, 17 Cal. App. 4th 1284, 1292, 22 Cal. Rptr. 2d 20, 24 (1993) (quoting People v. McHale, 25 Cal. 3d 626, 632, 602 P.2d 731, 159 Cal. Rptr. 811 (1975), in defining an “unlawful business activity” as including anything that can properly be called a business practice and is forbidden by law). See generally Sean P. Murphy, As Economy Falls, Fraud Reports Rise, BOSTON GLOBE, Feb. 16, 1991, at 29P (noting that once the economy falters, people will offer deals to desperate people, and thus the rise in white-collar crime).

2. See BLACK'S LAW DICTIONARY 1313 (6th ed. 1990) (defining “restitution” as an equitable remedy under which a victim is returned to his or her original position prior to the loss or injury). See generally Robert T. Manicke, A Tax Deduction for Restitutionary Payments?, 1992 U. ILL. L. REV. 593, 609-11 (1992) (discussing the purposes and policies of restitution and the different philosophies of restitution with respect to whether it is more properly a victim compensation or a punishment).

3. CAL. BUS. & PROF. CODE § 17203 (West Supp. 1995); see id. (providing that any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction, and authorizing the judge to make any necessary orders or judgments to restore any person in interest any money or real or personal property which may have been acquired by means of such unfair competition); see also CAL. CONST. art. 1, § 28(b) (indicating that victims of crime have a right to restitution from the persons convicted of the crime); CAL. GOV'T CODE § 13959 (West 1992) (declaring that it is in the public interest to assist victims to obtain restitution for losses resulting from criminal acts); CAL. PENAL CODE § 1203.1(b) (West Supp. 1995) (allowing the court to consider restitution as a condition of probation); cf. 18 U.S.C.A. § 3663(a), (b), (d), (e) (West 1985 & Supp. 1995) (allowing the court to order restitution for certain crimes that result in property loss or damage, unless the complication or prolongation of the sentence outweighs the need for restitution, and the victim receives or will receive compensation elsewhere); NEV. REV. STAT. § 4.375 (1994) (permitting the court to order amounts for restitution to the owner of property embezzled); N.M. STAT. ANN. § 31-17-1(A), (B) (Michie Special Pamphlet 1994) (announcing the intent of the New Mexico Legislature to make violators provide restitution to their victims and requiring the court to order restitution as a condition of probation or parole). See generally People v. Tucker, 37 Cal. App. 4th 1, 44 Cal. Rptr. 2d 1 (holding that a criminal defendant may be ordered to pay restitution to the victim in the amount of appreciation of the assets the defendant embezzled); Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 453, 249 Cal. Rptr. 872, 885 (1988) (recognizing the authority of the court to prohibit unfair practices, including imposition of injunctions and restitution); Gregory Crouch, Orange County: 1990: The Year in Review, L.A. TIMES, Dec. 23, 1990, at D1 (noting the criminal charges against Charles H. Keating Jr. for allegedly misleading investors to buy more than $200 million in bonds that became worthless, and which are expected to cost taxpayers two billion dollars); Michael Flagg, Steven Wymer Given 14%-Year Prison Term, L.A. TIMES, May 12, 1993, at A1 (discussing the criminal history of a convicted white collar criminal who embezzled $29 million from clients and spent the money on items including $635,000 in property in La Quinta, California, to Florida, and $400,000 in luxury and classic cars).
felonies,\(^4\) of which a material element is fraud\(^5\) or embezzlement, "involving a pattern of related felonious conduct and the taking of $500,000, the person is, upon the conviction of two or more felonies in a single criminal proceeding, subject to two, three, or five additional years in the state prison.\(^7\) In addition, Chapter 794 imposes a fine not exceeding $500,000 or double the value of the taking, whichever is greater, and liability for restitution to any victim.\(^8\)

Chapter 794 also establishes a procedure for the preservation of the property or assets of any person alleged to be subject to the punishment enhancement, and the levy upon that property or assets upon the conviction of the person, in order to assure the victim receives restitution and the county that prosecuted the person receives the fines imposed.\(^9\)

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4. See CAL. PENAL CODE § 17(a) (West Supp. 1995) (defining "felony" as a crime punishable with death or by imprisonment in the state prison).
5. See CAL. CIV. CODE § 1572 (West 1982) (defining "actual fraud" as consisting of acts committed by or in connivance with a party to the contract, with intent to deceive another party thereto, or to induce him to enter into the contract by means of false assertion, omission, or any other deceitful act).
6. See CAL. PENAL CODE § 503 (West 1988) (defining "embezzlement" as the fraudulent appropriation of property by a person to whom it has been entrusted).
7. Id. § 186.11(a), (d) (enacted by Chapter 794).
8. Id. § 186.11(c) (enacted by Chapter 794).
9. Id. § 186.11(e)(1)-(7), (g)(1)-(10), (h), (i)(1)-(3), (j)(1)-(5), (k) (enacted by Chapter 794); see id. § 186.11(e)(1) (enacted by Chapter 794) (providing that if a person is alleged to have committed two or more felonies and the white collar crime enhancement is also charged, any assets or property in the defendant's control or transferred, except to a bona fide purchaser, even if out of state, may be preserved by the Superior Court in order to pay restitution); id. § 186.11(e)(2) (enacted by Chapter 794) (permitting the prosecutor to file a petition seeking a temporary restraining order, preliminary injunction, the appointment of a receiver, or any other protective relief necessary, to preserve the assets of the accused); id. § 186.11(e)(3), (4) (enacted by Chapter 794) (requiring a notice to be sent by personal service or registered mail to every person having an interest in the property, a publication for three consecutive weeks in a newspaper generally circulated in the county, and the prosecutor to record a lis pendens in the county where the real property sits); id. § 186.11(e)(5) (enacted by Chapter 794) (permitting the prosecutor to obtain an order for a financial institution to disclose the account numbers and value); id. § 186.11(e)(6) (enacted by Chapter 794) (requiring a person with an interest in the property to respond within 30 days from the first publication or receipt of actual notice); id. § 186.11(g)(1), (2) (enacted by Chapter 794) (allowing a temporary restraining order to be issued by a court, ex parte, which may be based on the sworn declaration of a peace officer that establishes probable cause, and allowing a defendant or an interested party to have a hearing within 10 days to show cause for the restraining order to stay in effect); id. § 186.11(g)(3)-(10) (enacted by Chapter 794) (providing that the court must consider the degree of certainty of the outcome on the merits and the consequences to the parties, the protection of innocent third parties, ordering an interlocutory sale of property liable to perish, to waste, or subject to reduction in value); id. § 186.11(h) (enacted by Chapter 794) (requiring the dissolution of property subject to the injunction, or the court may continue the order if the jury does not reach a unanimous verdict); id. § 186.11(i)(1) (enacted by Chapter 794) (stating that the court will continue the order for freezing assets until the sentencing hearing determines what portion of the property will be used for restitution); id. § 186.11(j) (enacted by Chapter 794) (mandating an appointee to liquidate all property in a specified order for expenses of a sale, the lien holder, the victim, and any fines); id. § 186.11(k) (enacted by Chapter 794) (declaring that if the proceeds of the sale is insufficient, then 70% of the proceeds after payment for expenses of a sale and for liens must go to the victim for restitution); see also Henry J. Amoroso, Organizational Ethos and Corporate Criminal Liability, 17 CAMPBELL L. REV. 47, 60 (1995) (noting a study which concluded that if expected penalties equaled social costs of white collar criminal behavior, then the criminal offender may be induced to comply with the law); id. at 60-61 (indicating that corporate offenders only pay a portion of the costs to the total harm done as a result of the white collar criminal activity); cf. 1995 Ariz. Legis. Serv. ch. 188, sec. 2, at 1362 (West) (amending ARIZ. REV. STAT. ANN. § 13-804(A)) (permitting a court to enter an order of restitution and to create a restitution lien in favor of the state for restitution, fine surcharges and fees, or in the victim for
The purpose of Chapter 794 is to preserve the property or assets of persons alleged to have engaged in a pattern of fraudulent or unlawful activity in order to obtain restitution for the victims and recover fines ordered by the court. Thus, Chapter 794 prevents white collar crime defendants from dissipating, hiding, or transferring out of the jurisdiction of the court funds stolen from their victims and enjoying the benefits of their crimes, even if a term of incarceration is imposed. In addition, Chapter 794 provides prosecutors the ability to preserve assets more easily through the use of hearsay and other reliable sources when seeking a grant of a preliminary injunction or temporary restraining order for freezing assets. Furthermore, proponents of Chapter 794 believe that because the asset forfeiture is dependent upon a criminal conviction, Chapter 794 avoids the double-jeopardy challenges faced by other forfeiture legislation.

Selected 1995 Legislation

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Opposition to Chapter 794 expresses concern about possible false accusations of criminal conduct which would cause the defendant's assets to be frozen before the defendant had an opportunity to respond to the accusation. In addition, the opponents feel that it is not just for a defendant to maintain the burden of proof in showing a need for the funds in order to gain access to his or her own money when that defendant has not been convicted of any crime.

Chad D. Bernard