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# Criminal Procedure

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# Criminal Procedure

## Criminal Procedure; strip searches

Penal Code §4030 (new); §851.5 (amended); Vehicle Code §40304.5 (new).

AB 1367 (Waters); 1984 STAT. Ch 35  
(*Operative March 31, 1984*)

Chapter 35 establishes a statewide policy strictly limiting strip and body cavity searches.<sup>1</sup> Chapter 35 also provides the right to make at least three completed telephone calls<sup>2</sup> upon arrest and to obtain bail when taken into custody on traffic or parking violations.<sup>3</sup>

### *Phone Calls*

Under prior law, an arrested person immediately upon being booked and no later than three hours after arrest had the right to make at least two completed phone calls.<sup>4</sup> Chapter 35 permits an arrested person three completed phone calls.<sup>5</sup>

### *Booking*

Chapter 35 provides that a person taken into custody on not more than two outstanding warrants for failure to appear on a traffic infraction must be given at least three hours and three completed phone calls to arrange bail.<sup>6</sup> An arrest record will be made and the person booked, photographed, and fingerprinted only if the person is unable to arrange bail.<sup>7</sup>

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1. CAL. PENAL CODE §4030(a).

2. *Id.* §851.5.

3. CAL. VEH. CODE §40304.5.

4. 1975 Cal. Stat. c. 1200, §2, at 2966 (amending CAL. PENAL CODE §851.5).

5. CAL. PENAL CODE §851.5.

6. CAL. VEH. CODE §40304.5.

7. *Id.*

### Strip Searches

Existing California case law<sup>8</sup> permits a person who is arrested and detained for any offense to be subjected to a strip<sup>9</sup> and visual body cavity<sup>10</sup> search prior to placement in any jail facility.<sup>11</sup> A strip search under existing California case law can be conducted without reason to believe the person detained is concealing weapons or drugs.<sup>12</sup>

In contrast, Chapter 35 strictly limits strip and body cavity searches in order to protect constitutional rights to privacy and freedom from unreasonable searches and seizures.<sup>13</sup> Convicted persons, however, in the custody of the Department of Corrections or the California Youth Authority, may be strip searched or body cavity searched.<sup>14</sup> Furthermore, Chapter 35 permits all persons arrested and detained to be subjected to patdown, metal detector, or clothing searches prior to being placed in a booking cell.<sup>15</sup>

Chapter 35 prohibits, prior to placement in the general jail population, strip and *visual* body cavity searches<sup>16</sup> of (1) persons arrested and detained for minor offenses,<sup>17</sup> and (2) juveniles detained prior to detention hearings for minor offenses,<sup>18</sup> unless the offenses

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8. *People v. Benz*, 156 Cal. App. 3d 483, 487, 203 Cal. Rptr. 28, 31 (1984). *Benz*, decided approximately two months after Chapter 35 became law, appears to conflict with the provisions of Chapter 35 regulating strip searches. *Id.*

9. CAL. PENAL CODE §4030(c). Strip search is a search that requires removing or arranging clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia. *Id.*

10. Body cavity is a stomach, rectal cavity, or vagina. *Id.* §4030(d)(1). Visual body cavity search is a visual inspection of a body cavity. *Id.* §4030(d)(2). Physical body cavity search is a physical intrusion into a body cavity for the purpose of discovering objects concealed in the body cavity. *Id.* §4030(d)(3).

11. M. KRAUSE, CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA SEARCH AND SEIZURE PRACTICE 139 (1977). Purpose is to prevent the introduction of weapons or contraband into the jail. *Id.* See *People v. Benz*, 156 Cal. App. 3d 483, 487, 203 Cal. Rptr. 28, 31 (1984) (justification is inventory and jail safety). See M. KRAUSE, *supra*, at 139 (1977) (scope of booking search incident to incarceration is uncertain). California case law allows for strip searches as part of booking and jailhouse inventory searches. *People v. Laiwa*, 34 Cal. 3d 711, 725-26, 669 P.2d 1278, 1287, 195 Cal. Rptr. 503, 512 (1983).

12. See *People v. Benz*, 156 Cal. App. 3d 483, 489, 203 Cal. Rptr. 28, 32 (1984) (no probable cause required for a jailhouse inventory search).

13. CAL. PENAL CODE §4030(a).

14. *Id.* §4030(b).

15. *Id.* §4030(e) (to discover and retrieve concealed weapons and drugs).

16. *Id.* §4030(f).

17. *Id.* (persons arrested and detained for minor offenses include persons arrested and held on a misdemeanor or infraction, except those involving weapons, controlled substances or violence).

18. *Id.* (juveniles detained prior to detention hearings for minor offenses include juveniles detained prior to detention hearings under California Welfare and Institutions Code sections 300, 601, or 602, except those alleged to have committed felonies or offenses involving weapons, controlled substances or violence).

involved weapons, controlled substances, or violence,<sup>19</sup> or the police had probable cause<sup>20</sup> to believe an individual was concealing a weapon or drugs.<sup>21</sup> Before a strip or *visual* body cavity search may be conducted, Chapter 35 requires a supervising officer to sign a written authorization setting forth facts showing probable cause.<sup>22</sup> In addition, *physical* body cavity searches of detainees for minor offenses and juveniles detained prior to detention hearings for minor offenses are permitted only if a magistrate issues a search warrant specifically authorizing a *physical* body cavity search.<sup>23</sup>

Chapter 35 requires those who conduct a strip, *visual* or *physical* body cavity search, except for physicians and licensed medical personnel, to be of the same sex as the person being searched<sup>24</sup> and prohibits touching that persons breasts, buttocks, or genitalia.<sup>25</sup> Furthermore, all strip, *visual* body cavity, or *physical* body cavity searches must be conducted in a place that cannot be observed by nonparticipants<sup>26</sup> in the search.<sup>27</sup> In addition, *physical* body cavity searches must be conducted under sanitary conditions only by medical personnel.<sup>28</sup>

Under Chapter 35, any person who intentionally<sup>29</sup> authorizes or conducts, in an improper manner<sup>30</sup> or without probable cause, a strip, *visual*, or *physical* body cavity search of a person detained for a minor offense is guilty of a misdemeanor.<sup>31</sup> Chapter 35 permits a person damaged or harmed by a wrongful strip, *visual*, or *physical* body cavity search<sup>32</sup> to bring a civil action to recover actual damages,<sup>33</sup> punitive damages, and reasonable attorney's fees.<sup>34</sup>

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19. *Id.*

20. *Id.* (reasonable suspicion based on specific and articulable facts that person is concealing a weapon or drugs).

21. *Id.*

22. *Id.* §4030(i)(written authorization must be placed in the records of the agency and made available on request to the person searched).

23. *Id.* §4030(h). A search warrant must be placed in the records of the agency and made available upon request to the person searched. *Id.* §4030(i). See generally 2 W. LAFAYE, SEARCH AND SEIZURE A TREATISE ON THE FOURTH AMENDMENT §5.3(c) at 325-30 (1978) and at 95-97 (1984 Supp.) (warrant generally required for physical body cavity search).

24. CAL. PENAL CODE §4030(l).

25. *Id.* §4030(j).

26. *Id.* §4030(m) (description of who may be deemed a participant).

27. *Id.*

28. *Id.* §4030(k) (physician, nurse practitioner, registered nurse, licensed vocational nurse, or emergency medical technician Level II licensed in California, or physician providing health care to the jail population).

29. *Id.* §4030(n) (knowingly and willfully).

30. See *id.* §4030(j), (k), (l), (m) (restrictions on the manner of conducting strip, visual and physical body cavity searches).

31. *Id.* §4030(n).

32. *Id.* §4030(f), (h), (j), (k), (l), (m).

33. *Id.* §4030(p) (or \$1000 whichever is greater).

34. *Id.*

### Confinement

With the enactment of Chapter 35, a person arrested and detained for a minor offense may be confined in the general jail population, if that person cannot post bail within three hours.<sup>35</sup> Additionally, Chapter 35 provides that a person who could (1) be cited and released,<sup>36</sup> (2) be released on that person's own recognizance,<sup>37</sup> or (3) post bail within three hours can be placed in the general jail population,<sup>38</sup> if a documented emergency exists,<sup>39</sup> no reasonable alternative to general jail population exists,<sup>40</sup> and the facility supervisor signs a written authorization documenting the specific facts and circumstances of the emergency.<sup>41</sup>

### Comment

A question left unanswered by Chapter 35 is whether a person arrested for a minor offense can be strip searched without probable cause *after* placement in the general jail population.<sup>42</sup> Existing case law is divided as to whether strip searches without probable cause of persons detained for minor offenses are unreasonable searches and seizures.<sup>43</sup> The United States Supreme Court has indicated that strip searches without probable cause probably can be conducted pursuant to lawful custody,<sup>44</sup> and can be justified as searches incident to arrest<sup>45</sup> or as booking, jailhouse inventory searches.<sup>46</sup> The California courts have routinely upheld strip searches conducted as booking, jailhouse inventory searches prior to placement into the general jail population or a booking cell.<sup>47</sup> The California Supreme Court, however, has held

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35. *Id.* §4030(g)(1)(iii) (assuming not cited and released or released on own recognizance).

36. *Id.* §4030(g)(1)(i).

37. *Id.* §4030(g)(1)(ii).

38. *Id.* §4030(g)(1)(iii).

39. *Id.* §4030(g)(2).

40. *Id.*

41. *Id.*

42. *Id.* §4030(f). See Governor Deukmejian's Press Release No. 148 (March 8, 1984) (copy on file at *Pacific Law Journal*). A person detained for a minor offense may be placed in the general jail population if that person cannot post bail within three hours or a documented emergency exists. CAL. PENAL CODE §4030(g).

43. Compare *People v. Benz*, 156 Cal. App. 3d 483, 488-89, 203 Cal. Rptr. 28, 32 (1984) with *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir. 1984).

44. 2 W. LAFAVE, SEARCH AND SEIZURE A TREATISE ON THE FOURTH AMENDMENT, §5.3(c) at 322 (1978). But see *id.* §5.3(c) at 97 (1984 Supplement) (citing *Illinois v. Lafayette*, 103 S.Ct. 2605, 2609 n.2 (1983), in which the Court cautioned that it has not considered "the circumstances in which a strip search of an arrestee may or may not be appropriate").

45. *United States v. Robinson*, 414 U.S. 218, 224 (1973).

46. *Bell v. Woolfish*, 441 U.S. 520, 560 (1979); *United States v. Edwards*, 415 U.S. 800, 805 (1974).

47. See M. KRAUSE, CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA SEARCH

that full body searches without probable cause cannot be justified as searches incident to arrest.<sup>48</sup> The California Constitution requires a higher standard than the *minimum* standard established by the United States Supreme Court in order to satisfy the fourth amendment.<sup>49</sup> In recent years, several Federal Circuit Courts of Appeals have held that strip searches without probable cause of persons detained for minor offenses, even if placed into the general jail population, are unreasonable searches and seizures and violative of the fourth amendment.<sup>50</sup> Thus, although existing United States Supreme Court and California Supreme Court decisions apparently have upheld the constitutionality of strip searches without probable cause incident to placement in the general jail population,<sup>51</sup> in recent years some courts have reached the opposite conclusion.<sup>52</sup>

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AND SEIZURE PRACTICE, 139 (1977). *Accord* *People v. Benz*, 156 Cal. App. 3d 483, 487, 203 Cal. Rptr. 28, 31 (1984).

48. *People v. Brisendine*, 13 Cal. 3d 528, 538-40, 531 P.2d 1099, 1105-06, 119 Cal. Rptr. 315, 321-22 (1975).

49. *Id.* at 545, 531 P.2d at 1110, 119 Cal. Rptr. at 326; *see* CAL. CONST. art. I, §13.

50. *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984). *Accord* *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied* 455 U.S. 942 (1982); *Tinetti v. Wittke*, 479 F. Supp. 486, 490 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980).

51. *See supra* notes 49 and 50 and accompanying text.

52. *See supra* note 50 and accompanying text.

## Criminal Procedure; child abuse evidence

Evidence Code §767 (amended); Penal Code §§273a, 273d, 868.5, 868.7, 1048, 1203.066, 1346, 11166 (amended); Welfare and Institutions Code §827 (amended).

SB 1899 (Watson); 1984 STAT. Ch 1423

Existing law permits the use of leading questions.<sup>1</sup> Under existing law, leading questions of a witness who is a child victim of sexual abuse are permissible and within the discretion of the court.<sup>2</sup> Chapter 1423 permits leading questions to be asked of a witness under the

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1. CAL. EVID. CODE §§767,764 (definition of leading questions).

2. *See* *People v. Tober*, 241 Cal. App. 2d 66, 69-70, 50 Cal. Rptr. 228, 230 (1966). A leading question is permissible and within the discretion of the trial court when the witness is a ten year old victim of sexual abuse. *Id.* at 69-70, 50 Cal. Rptr. at 230. *See also* *People v. Wilder*, 151 Cal. App. 2d 698, 707, 312 P.2d 425, 431 (1957).

age of ten in any case involving child abuse or child molestation.<sup>3</sup>

Under prior law, the punishment for felony child abuse and felonious infliction of cruel corporal punishment upon a child was imprisonment in the state prison for two, three, or four years, or in the county jail for not more than one year.<sup>4</sup> Chapter 1423 increases the penalties for these crimes to imprisonment in the state prison for two, four, or six years, or in the county jail for not more than one year.<sup>5</sup>

Existing law permits prosecuting witnesses sixteen years of age or younger, in cases involving specified sex offenses,<sup>6</sup> to have the supportive attendance of a parent, guardian, or sibling at the preliminary hearing and at the trial during their testimony.<sup>7</sup> Chapter 1423 extends the right of supportive attendance to cases involving felony child abuse and felonious infliction of cruel corporal punishment on a child.<sup>8</sup>

Under existing law, preliminary examinations in sex offense cases may be closed upon the prosecutor's motion, if the witness is the complaining victim of a sex offense and if the victim's testimony is likely to cause serious psychological harm.<sup>9</sup> Chapter 1423 extends this protection by allowing the closing of preliminary examinations of the complaining victims of child abuse.<sup>10</sup>

All criminal actions involving a minor victim of specified sex offenses<sup>11</sup> are given calendar preference under existing law.<sup>12</sup> Chapter 1423 extends calendar preference to child abuse and incest actions.<sup>13</sup>

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3. CAL. EVID. CODE §767(b). See CAL. PENAL CODE §§273a, 273d (child abuse), 288 (child molestation).

4. 1980 Cal. Stat. c. 1117, §4, at 350 (amending CAL. PENAL CODE §§273a, 273d).

5. Compare CAL. PENAL CODE §§273a, 273d with 1980 Cal. Stat. c. 1117, §4, at 350 (amending CAL. PENAL CODE §§273a, 273d).

6. CAL. PENAL CODE §868.5; see *id.* §§243.4 (sexual battery), 261 (rape), 285 (incest), 286 (sodomy), 288 (lewd or lascivious acts with a child under fourteen), 288a (oral copulation), 289 (penetration of genital or anal openings by foreign object), 647a (lewd or dissolute conduct in public place), 314(1) (indecent exposure).

7. *Id.* §868.5; see *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 589-91 (1984) (attendants for prosecuting witnesses).

8. Compare CAL. PENAL CODE §868.5 with 1983 Cal. Stat. c. 347, §1, at \_\_\_\_ (amending CAL. PENAL CODE §868.5). See CAL. PENAL CODE §§273a (child abuse), 273d (infliction of cruel corporal punishment upon a child).

9. CAL. PENAL CODE §868.7; see *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 581, 583 (1983) (closing of preliminary examinations).

10. Compare CAL. PENAL CODE §868.7 with 1982 Cal. Stat. c. 83, §4, at 245 (enacting CAL. PENAL CODE §868.7). See CAL. PENAL CODE §11165(g) (definition of child abuse).

11. CAL. PENAL CODE §1048. Sex offenses specified are violations of CAL. PENAL CODE §§261 (rape), 264.1 (rape; acting in concert with force or violence), 286 (sodomy), 288 (lewd or lascivious acts with a child under fourteen), 288a (oral copulation) or 289 (penetration of genital or anal openings with a foreign object), and when such violations are committed by the use of force, violence or threat thereof. *Id.* §1048.

12. *Id.* §1048; see *Review of Selected 1979 California Legislation*, 11 PAC. L.J. 429 (1980) (discussion of law enacting priority of prosecution for sex offenses).

13. Compare CAL. PENAL CODE §1048 with 1979 Cal. Stat. c. 944, §11, at 325 (amending

Existing law provides that the court may place a person convicted of child molestation<sup>14</sup> on probation<sup>15</sup> after obtaining a report from a reputable psychologist<sup>16</sup> or psychiatrist regarding the convicted's mental condition.<sup>17</sup> Chapter 1423 requires the psychiatrist's or psychologist's report to ascertain (1) whether imprisonment of the convicted is in the best interest of the child victim, (2) if rehabilitation of the convicted is feasible, or (3) if the threat of physical harm to the child is present if no imprisonment is imposed.<sup>18</sup>

Existing law provides that in specified sex offense cases<sup>19</sup> when the victim's age is fifteen or younger, the prosecution may apply for an order allowing the victim's testimony at the preliminary hearing to be recorded on video tape.<sup>20</sup> Upon specified findings<sup>21</sup> the court may admit the videotape at trial as former testimony.<sup>22</sup> Chapter 1423 extends the admission of videotaped testimony during the preliminary examination of victims fifteen years of age or less testifying in child abuse cases.<sup>23</sup>

Existing law requires law enforcement agencies and county probation or welfare departments to immediately report any known or suspected instances of child abuse to specified local agencies.<sup>24</sup> Chapter 1423 extends the duty of law enforcement agencies, county probation or welfare departments to report known or suspected instances of child abuse to the district attorney's office.<sup>25</sup>

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CAL. PENAL CODE §1048); *see* §§273a, 273d (child abuse), 285 (definition of incest).

14. *Id.* §288 (definition of child molestation).

15. *Id.* §1203.066. The court may grant probation if all of the following factors are present: (1) the convicted is the victim's biological parent, adoptive parent, stepparent or relative, or member of victim's household, (2) imprisonment of the convicted is not in the best interest of the child victim, (3) rehabilitation of convicted offender is feasible, and (4) no threat of physical harm to the child is present if the convicted is not imprisoned. *Id.*

16. *Id.* §288.1; *see id.* §1027 (definition of reputable psychologist).

17. *Id.* §288.1.

18. *Id.* §1203.066(c).

19. *Id.* §1346. Sex offenses specified are California Penal Code sections 243.4 (sexual battery), 261 (rape), 261.5 (unlawful sexual intercourse with a female under age 18), 264.1 (rape; acting in concert), 285 (incest), 286 (sodomy), 288 (lewd or lascivious acts with a child under age 14), 288a (oral copulation), and 289 (penetration of genital or anal openings by foreign object). *Id.*

20. *Id.* §1346.

21. *Id.* §1346. The court must find that further testimony would be so emotionally taxing that the witness is medically unavailable, or unavailable as defined by section 240 of the Evidence Code. *Id.* §1346.

22. *Id.* §1346; *see* CAL. EVID. CODE §1291 (admission of former testimony).

23. *Compare* CAL. PENAL CODE §1346 with 1983 Cal. Stat. c. 942, §1, at \_\_\_\_ (amending CAL. PENAL CODE §1346).

24. CAL. PENAL CODE §11166(g). Local agencies include the law enforcement agency having jurisdiction and local agency investigating dependent children of the court. *Id.* §11166(g). *See* §11165 (definition of child abuse).

25. *Compare* CAL. PENAL CODE §11165(g) with 1982 Cal. Stat. c. 905, §2, at 3337 (amending Cal. Penal Code §11166).



## **Criminal Procedure; restitution**

Government Code §13967 (amended); Penal Code §1464 (repealed and amended)\*; §§1202.4, 1203, 1203.04, 1214 (amended); Welfare and Institutions Code §§729.6, 730.6 (amended).  
AB 2765 (Sher); 1984 STAT. Ch 1340.

In a response to Proposition Eight, the California Legislature enacted the Crime Restitution Program of 1983 (hereinafter referred to as the Program).<sup>1</sup> The Program imposes restitution fines upon persons convicted of various crimes, including certain crimes under the juvenile court law.<sup>2</sup>

Existing law permits an order to pay the restitution fine to be stayed pending successful completion of probation, and upon successful completion, existing law allows the stay to become permanent.<sup>3</sup> Chapter 1340 provides that if a restitution fine has been stayed pending successful completion of probation,<sup>4</sup> upon revocation of probation and imposition of sentencing, the stay will be lifted and the fine paid.<sup>5</sup>

Under the Program, in every case involving a person convicted of a felony who is eligible for probation, the court must refer that case to a probation officer for an investigation and a probation report.<sup>6</sup> Existing law provides that the probation report must include a determination of whether a defendant is required to pay a restitution fine.<sup>7</sup> Chapter 1340 requires that a probation report also include the recommended amount of restitution to be paid.<sup>8</sup> In addition, the probation officer is required to recommend in the probation report

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\* Section 1464 as amended by section 1 of Chapter 1437 of the Statutes of 1982 is repealed. 1984 Cal. Stat. c. 1340, §7.5, at \_\_\_\_\_. Section 1464 as added by section 3.5 of Chapter 1437 of the Statutes of 1982 is repealed. 1984 Cal. Stat. c. 1340, §8, at \_\_\_\_\_.

1. See 1983 Cal. Stat. c. 568, §4 at \_\_\_\_; *id.* c. 932, §4, at \_\_\_\_; *id.* c. 938, §11, at \_\_\_\_; *id.* c. 939, §4, at \_\_\_\_; *id.* c. 940, §7, at \_\_\_\_; *id.* c. 954, §6, at \_\_\_\_; *id.* c. 1092, §424, at \_\_\_\_; see also *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 559 (1984) (reviewing the Crime Restitution Program of 1983). See also November 1982 California Ballot Pamphlet, Proposition Eight, §1.

2. See 1983 Cal. Stat. c. 568, §4 \_\_\_\_; *id.* c. 932, §4, at \_\_\_\_; *id.* c. 938, §11, at \_\_\_\_; *id.* c. 939, §4, at \_\_\_\_; *id.* c. 940, §7, at \_\_\_\_; *id.* c. 954, §6, at \_\_\_\_; *id.* c. 1092, §424, at \_\_\_\_.

3. CAL. PENAL CODE §1202.4(b).

4. *Id.*

5. *Id.* §1202.4(c).

6. *Id.* §1203(b) (the probation report must contain recommendations regarding the granting or denying of probation).

7. *Id.*; see CAL. GOV'T CODE §13967 (the determination whether the defendant is required to pay the fine).

8. CAL. PENAL CODE §1203(b).

whether restitution should be made to the victim or to the Restitution Fund.<sup>9</sup>

Under prior law, if a person were not eligible for probation, the judge had the option to refer the matter to a probation officer for an investigation of facts relevant to the sentencing.<sup>10</sup> Chapter 1340 provides that if a person is not eligible for probation, the judge is *required* to refer the matter to a probation officer for (1) a determination of whether a restitution fine is applicable,<sup>11</sup> and (2) a recommendation of the amount of the restitution fine.<sup>12</sup>

Prior law required the imposition of restitution fines upon convictions<sup>13</sup> and provided for waiver of the minimum amounts.<sup>14</sup> Chapter 1340 deletes the minimum amounts<sup>15</sup> and the corresponding waiver provisions.<sup>16</sup> Existing law provides methods for minors to make restitution<sup>17</sup> and requires, as a condition of probation, that a minor make restitution as ordered by the court if the minor has not been removed from the physical custody of the parent or guardian.<sup>18</sup> Chapter 1340 expands existing law by requiring the minor to make restitution whether or not the minor has been removed from the physical custody of the parent or guardian.<sup>19</sup>

9. *Id.* If the crime involves a victim, restitution must be made to that victim. *Id.* §1203.04(a)(1); CAL. WELF. & INST. CODE §729.6(a)(1). When the crime does not involve a victim, restitution must be paid to the Restitution Fund. CAL. PENAL CODE §1203.04(a)(2); CAL. WELF. & INST. CODE §729.6(a)(2). *See also Review of Selected 1983 California Legislation*, 15 PAC. L.J. 562 (1984) (reviewing methods of restitution payment). The proceeds of the Restitution Fund are used to indemnify victims of crime who have incurred loss of income or support, medical expenses, or burial expenses. CAL. GOV'T CODE §§13965, 13967(b). *See also id.* §13961 (specifying application procedure).

10. 1983 Cal. Stat. c. 1063, §1, at \_\_\_\_ (amending CAL. PENAL CODE §1203).

11. CAL. PENAL CODE §1203(g).

12. *Id.*

13. The minimum amounts were \$100 for felony convictions and \$10 for misdemeanor convictions. 1983 Cal. Stat. c. 568, §2, at \_\_\_\_ (enacting CAL. PENAL CODE §1203.04). Under juvenile law, the minimum amounts were \$10 for felony convictions and \$5 for misdemeanor convictions. 1983 Cal. Stat. c. 940, §3, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE §729.6). Juvenile law also provided for minimum amount of \$10 for minors committing one or more felony offenses, 1983 Cal. Stat. c. 940, §4, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE §730.6).

14. 1983 Cal. Stat. c. 940, §4, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE §730.6).

15. *Compare* CAL. PENAL CODE §1203.04 *with* 1983 Cal. Stat. c. 568 §2, at \_\_\_\_ (enacting CAL. PENAL CODE §1203.04); CAL. WELF. & INST. CODE §729.6 *with* 1983 Cal. Stat. c. 940, §3, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE §729.6); CAL. WELF. & INST. CODE §730.6 *with* 1983 Cal. Stat. c. 940, §4, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE §730.6).

16. *Compare* CAL. WELF. & INST. CODE §730.6(c) *with* 1983 Cal. Stat. c. 940, §4, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE §730.6).

17. CAL. WELF. & INST. CODE §729.7.

18. *Id.* §729.6(a).

19. *Compare id.* §729.6(a) *with* 1983 Cal. Stat. c. 940, §3, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE §729.6).

## Criminal Procedure; felony statute of limitations

Penal Code §§799, 800, 801, 802, 802.5, 803 (repealed); §§799, 800, 801, 802, 803, 804, 805, 806 (new).  
AB 2764 (Sher); 1984 STAT. Ch 1270

In 1981, the California Legislature directed the California Law Revision Commission to make a study of the statutes of limitations applicable to felonies and to submit recommendations for legislation.<sup>1</sup> Chapter 1270, in response to the recommendations of the Commission,<sup>2</sup> repeals prior law governing criminal statutes of limitations<sup>3</sup> and creates a comprehensive statutory scheme for the limitations periods for each crime or category of crimes.<sup>4</sup>

Under Chapter 1270, the severity of an offense, measured by the punishment imposed, determines the limitation period that applies to prosecutions for the offense.<sup>5</sup> Chapter 1270 specifies that for the purposes of determining the applicable limitation of time, an offense is deemed punishable by the maximum punishment prescribed by statute.<sup>6</sup>

Chapter 1270 provides that prosecutions<sup>7</sup> for felonies punishable by life imprisonment or death are not subject to any statute of limitations and may be commenced at any time.<sup>8</sup> Felonies punishable

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1. 1981 Cal. Stat. c. 909, §3, at 3443.

2. California Law Revision Commission, *Recommendation Relating to Statute of Limitations for Felonies*, 17 CAL. L. REVISION COMM'N REPORTS 301, 313-30 (1984) [hereinafter cited as *Recommendation*]. See also Uelman, *Making Sense Out of the California Criminal Statute of Limitations*, 15 PAC. L.J. 35 (1983) (study of the California criminal statute of limitations prepared for the California Law Revision Commission).

3. 1984 Cal. Stat. c. 1270, §1, at\_\_\_\_ (repealing CAL. PENAL CODE §§799, 800, 801, 802, 802.5, 803).

4. CAL. PENAL CODE §§799-806. See *Recommendation*, *supra* note 2, at 317-24.

5. CAL. PENAL CODE §§799-803. See also *Recommendation*, *supra* note 2, at 313-14.

6. CAL. PENAL CODE §805(a). Any enhancement of punishment prescribed by statute is disregarded in determining the maximum punishment. *Id.*

7. A prosecution for an offense is commenced when an indictment is filed, a complaint is filed with an inferior court having original trial jurisdiction, a case is certified to the superior court, or an arrest or bench warrant is issued provided the warrant names or describes the defendant with a sufficient degree of particularity. CAL. PENAL CODE §804. See also *Recommendation*, *supra* note 2, at 322-23 (issuance of a "Doe" warrant does not reasonably inform a person of the prosecution and, therefore, does not satisfy the statute of limitations).

8. CAL. PENAL CODE §799. See *id.* §§37 (treason), 128 (procuring execution by perjury), 218, 219 (train wrecking resulting in death), 4500 (assault with a deadly weapon by a life term prisoner), 12310 (bombing resulting in death or bodily injury); CAL. MIL. & VET. CODE §1672 (making defective war materials that cause death). Since each of these offenses are punishable by life imprisonment or death, Chapter 1270 provides that prosecutions for these offenses are not subject to any statute of limitations. CAL. PENAL CODE §799. Prosecutions for all of these offenses formerly were subject to a three year statute of limitations 1982 Cal. Stat. c. 583,

by imprisonment for eight years or more are subject to a six year statute of limitations.<sup>9</sup> All other offenses punishable by imprisonment in the state prison have a three year limitation on prosecutions.<sup>10</sup> Prosecutions for misdemeanors and infractions must be brought within one year after the commission of the offense.<sup>11</sup>

Chapter 1270 also provides that the limitation period for certain felonies, having as a material element fraud or breach of a fiduciary obligation, or involving misconduct in office by a public officer or employee,<sup>12</sup> does not commence to run until discovery of the offense.<sup>13</sup> Except when a defendant is out of the state<sup>14</sup> or is being prosecuted for the same conduct in a state court,<sup>15</sup> the time limitation prescribed by Chapter 1270 for all other offenses is not tolled or extended for any reason.<sup>16</sup>

Finally, Chapter 1270 provides that the new statutes of limitation apply retroactively to crimes committed before Chapter 1270 becomes operative on January 1, 1985.<sup>17</sup> The chapter does not apply, however, if the former statute of limitations for an offense under prior law has expired before the operative date of Chapter 1270, or when prosecution for the offense was commenced before the operative date.<sup>18</sup>

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§1, at 2544 (amending CAL. PENAL CODE §800). *See also Recommendation, supra* note 2, at 318-19, 326-27.

9. CAL. PENAL CODE §800. Chapter 1270 provisions increase the limitations period from three to six years for violations of California Penal Code sections 193 (vehicular manslaughter involving drunk driving and gross negligence), 245(c) (assault with a firearm on a peace officer or fireman in performance of their duties), 451 (arson causing bodily injury), 664 (attempting a crime punishable by life imprisonment), and 12308-12309 (explosion of a destructive device with intent to murder or causing bodily injury). *Id.* Chapter 1270 changes the statute of limitations for voluntary manslaughter (California Penal Code Section 192(1)) from three years after the discovery of the offense to three years after the commission of the crime. *Id.* *See also Recommendation, supra* note 2, at 319, 327.

10. CAL. PENAL CODE §801. Chapter 1270 changes the statute of limitations for violations of California Penal Code section 192(2)(involuntary manslaughter) from three years after discovery of the offense to three years after commission of the crime. *Id.* Violations of California Penal Code sections 286(f) (sodomy with an unconscious victim), and 288a(f) (oral copulation with an unconscious victim) are subject to a three year limitation period under Chapter 1270. *Id.*

11. *Id.* §802.

12. *Id.* §803(c).

13. *Id.*

14. *Id.* §803(d).

15. *Id.* §803(b).

16. *Id.* §803(a).

17. *Id.* §806.

18. *Id.* §806(c).

## **Criminal Procedure; dismissal as a bar to prosecution**

Penal Code §1387 (amended).

AB 3810 (Stirling); 1984 STAT. Ch 924

The termination or dismissal of a criminal prosecution may bar a subsequent prosecution for the same offense, except as specified under existing law.<sup>1</sup> Under Chapter 924, the dismissal of an action is not a bar to prosecution if the complaint is dismissed prior to a preliminary hearing and is exchanged for an indictment based on the same subject matter as charged in the dismissed complaint, information, or indictment.<sup>2</sup>

Existing law permits the defendant to make a motion to set aside an information or an indictment.<sup>3</sup> Under existing law, if a motion to set aside is granted, the order terminating the action may not bar subsequent prosecution if either (1) good cause is shown why the preliminary examination was not held within sixty days from the date of arraignment or plea,<sup>4</sup> or (2) the motion to set aside the information or indictment was granted because of the defendant's insanity, or lack of counsel after the defendant elected to proceed pro se rather than being represented by appointed counsel.<sup>5</sup> Under Chapter 924, the defendant's motion to set aside the information or indictment also may be based on (1) ineffective assistance of counsel,<sup>6</sup> (2) conflict of interest by defense counsel,<sup>7</sup> (3) violation of time deadlines based upon unavailability of defense counsel,<sup>8</sup> or (4) defendant's motion to withdraw a waiver of preliminary examination.<sup>9</sup> Additionally, Chapter 924 provides that the subsequent order terminating the action will not be a bar to subsequent prosecution if a motion dismissing the complaint is granted after dismissal of the action by the magistrate,<sup>10</sup> and the defendant then is recharged.<sup>11</sup>

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1. CAL. PENAL CODE §1387.

2. *Id.*

3. *Id.* §995(a).

4. *Id.* §1387(a).

5. *Id.* §1387(b)(1) and (2).

6. *Id.* §1387(b)(3).

7. *Id.* §1387(b)(4).

8. *Id.* §1387(b)(5).

9. *Id.* §1387(b)(6).

10. *Id.* §1387(c); *see id.* §871 (provisions for dismissal).

11. *Id.* *See id.* §739 (provisions for recharge).

## **Criminal Procedure; orders granting probation**

Penal Code §1205.3 (new).  
SB 1464 (Ellis); 1984 STAT. Ch 176

Under existing law a person convicted of a crime may be granted probation<sup>1</sup> if circumstances exist in mitigation of the punishment prescribed by law.<sup>2</sup> If probation is granted, existing law authorizes the court to require that the defendant comply with reasonable conditions of probation.<sup>3</sup> If the court imposes as a condition of probation that the defendant pay a fine or, as an alternative, perform community service work, Chapter 176 requires the court to state in the order granting probation the amount of the fine and the number of hours of community service work to be performed in lieu of payment of the fine.<sup>4</sup>

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1. CAL. PENAL CODE §1203(a) (definition of probation).
  2. *Id.* §1203(b).
  3. *Id.* §1203.1.
  4. *Id.* §1205.3.

## **Criminal Procedure; parole**

Penal Code §§3041.1, 3043.5 (new); §3057 (amended).  
AB 2192 (Nolan); 1984 STAT. Ch 805

Existing law allows the Board of Prison Terms<sup>1</sup> (hereinafter referred to as the Board) to set,<sup>2</sup> postpone,<sup>3</sup> or rescind any parole date.<sup>4</sup> The Board also may suspend or revoke parole.<sup>5</sup> Under existing law, the Governor also has the power to revoke parole.<sup>6</sup> Chapter 805 expands existing law by permitting the Governor to request a review of any decision granting or denying parole to any prisoner.<sup>7</sup> The Governor's request must be made at least ninety days prior to the scheduled parole

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1. CAL. PENAL CODE §5075.
  2. *Id.* §3041.
  3. *Id.* §3041.5.
  4. *Id.*
  5. *Id.* §3060.
  6. *Id.* §3062.
  7. *Id.* §3041.1

release date, and must state the reasons for the request.<sup>8</sup> When a review is requested, the full Board will review the parole decision,<sup>9</sup> and parole may be granted only upon majority vote of the Board members.<sup>10</sup>

Existing law provides for the revocation of parole by the Board.<sup>11</sup> Chapter 805 additionally provides that the Board must revoke the parole of any prisoner who refuses to sign a parole agreement.<sup>12</sup> Upon revocation of parole, the prisoner must be returned to prison for a period of not more than six months.<sup>13</sup> If the prisoner commits a subsequent act of misconduct while reconfined, the prisoner additionally may be confined for a maximum of twelve months.<sup>14</sup>

In apparent response to the case of *In re Fain*,<sup>15</sup> Chapter 805 enacts the Condit-Nolan Public Participation in Parole Act (hereinafter referred to as the Act).<sup>16</sup> The Act provides any interested member of the public with the right to submit statements indicating support or opposition to the granting of parole to any prisoner.<sup>17</sup> The Act requires the Board to review all information received from the public to ensure that the safety of the public is adequately considered in the Board's decision.<sup>18</sup> Upon completion of the review, the Board must include in the parole report its conclusion concerning the threat to public safety.<sup>19</sup>

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* §3060.

12. *Id.* §3060.5.

13. *Id.*

14. *Id.* §3057.

15. 145 Cal. App. 3d 540, 193 Cal. Rptr. 483 (1983). See News Release of Senator Jim Nielsen, (Feb. 3, 1984) (copy on file at the *Pacific Law Journal*).

16. CAL. PENAL CODE §3043.5.

17. *Id.* §3043.5(b).

18. *Id.* The gravity and the timing of all current or past convicted offenses also must be given adequate consideration. *Id.*

19. *Id.*

## **Criminal Procedure; release on citation**

Penal Code §853.6 (amended).

AB 2858 (Waters); 1984 STAT. Ch 952

Under prior law, when a person arrested for a misdemeanor<sup>1</sup> did

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1. CAL. PENAL CODE §17 (definition of misdemeanor).

not demand an appearance before a magistrate,<sup>2</sup> the arresting officer had the discretion to determine whether the person could be released subject to a promise to appear.<sup>3</sup> Existing law provides a list of statutory conditions for the arresting officer to provide as potential reasons for the nonrelease of a misdemeanor.<sup>4</sup> Under Chapter 952, however, an arresting officer is *required* to release the person unless one of these specific statutory conditions exist.<sup>5</sup>

Under prior law, an arresting officer could satisfy the statutory requirements by stating *any* reason for nonrelease of a misdemeanor.<sup>6</sup> Chapter 952 eliminates the ability of the arresting officer to state any reason for nonrelease and replaces, as another condition of nonrelease, a reason to believe that the misdemeanor would not appear in court for trial at the time and place specified.<sup>7</sup> Finally, Chapter 952 requires that the basis for determination of potential nonappearance be specifically stated.<sup>8</sup>

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2. *Id.* §7 (definition of magistrate).

3. 1959 Cal. Stat. c. 1558, §1, at 3888 (enacting CAL. PENAL CODE §853.6). *See* CAL. PENAL CODE §853.7 (violations of promise to appear).

4. *See* CAL. PENAL CODE §853.6(i)(1)-(9) (listing of reasons for nonrelease).

5. *Id.* §853.6(a).

6. 1976 Cal. Stat. c. 270, §1, at 562 (amending CAL. PENAL CODE §853.6).

7. *Compare* CAL. PENAL CODE §853.6(i)(9) with 1976 Cal. Stat. c. 270, §1, at 562 (amending CAL. PENAL CODE §853.6).

8. CAL. PENAL CODE §853.6(i)(9).

## **Criminal Procedure; denial of bail for violent sex offenders**

Penal Code §292 (new).

AB 3453 (Moore); 1984 STAT. Ch 1202

(Effective September 17, 1984)

Under existing law, a person accused of committing a violent felony<sup>1</sup> may be denied bail if the evidence of guilt is great,<sup>2</sup> and convincing evidence<sup>3</sup> exists that the accused is likely<sup>4</sup> to cause great bodily harm

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1. CAL. CONST. art. I, §12(b) (felony involving acts of violence against another).

2. *Id.* *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Bail Exception: Capital Cases* §150 (1963) (evidence must be such that a guilty verdict would be sustained on motion for new trial or appeal).

3. *See In re Nordin*, 143 Cal. App. 3d 538, 543, 192 Cal. Rptr. 38, 40 (1983) (convincing evidence requires a finding of high probability).

4. *Id.* at 543, 192 Cal. Rptr. at 41 (substantial likelihood must be determined on case-by-case basis).



to others if released.<sup>5</sup> Existing law also provides that a person accused of a nonviolent felony<sup>6</sup> may be denied bail if the evidence of guilt is great, convincing evidence exists that the accused has threatened another with great bodily harm,<sup>7</sup> and a substantial likelihood exists that the accused will carry out the threat if released.<sup>8</sup>

Chapter 1202 provides that violent sex crimes<sup>9</sup> are violent felonies against another<sup>10</sup> and are felony offenses involving great bodily harm<sup>11</sup> for purposes of denying an accused release on bail.<sup>12</sup> Thus, Chapter 1202 allows denial of bail to a person accused of a violent sex crime,<sup>13</sup> if the evidence of guilt is great,<sup>14</sup> and convincing evidence exists that the accused is likely to commit another violent sex crime or do other great bodily harm to another if released.<sup>15</sup> Furthermore, Chapter 1202 allows denial of bail to a person accused of a nonviolent felony,<sup>16</sup> if the evidence of guilt is great, convincing evidence exists that the accused has threatened to commit a violent sex crime or do other great bodily harm to another,<sup>17</sup> and a substantial likelihood exists that the accused will carry out the threat.<sup>18</sup>

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5. CAL. CONST. art. I, §12(b).

6. *Id.* §12(c).

7. *Id.*

8. *Id. See generally In re Nordin*, 143 Cal. App. 3d 538, 192 Cal. Rptr. 38 (1983) (upholding the constitutionality of preventive detention by denying bail for reasons of public safety). *But see Comment, Proposition Four: Preventive Detention v. Pretrial Liberty*, 14 PAC. L.J. 303 (1983) (questioning the constitutionality of preventive detention by denial of bail on grounds of public safety).

9. See CAL. PENAL CODE §292. Violent sex crimes are: (1) rape by force or threat of immediate bodily injury, (2) rape by threat of retaliation in the future, (3) rape or penetration of genital or anal opening by force or violence in concert with another, (4) sodomy on a child who is under 14 and is 10 years younger than accused by force or threat of immediate bodily injury, (5) sodomy by force or threat of immediate bodily injury in concert with another, (6) lewd and lascivious acts with a child under 14 by force or threat of great bodily harm, (7) oral copulation with a child under 14 and 10 years younger than the accused by force or threat of immediate bodily injury, (8) oral copulation by force or threat of immediate bodily harm in concert with another, and (9) penetration of genital or anal openings by foreign object by force or threat of immediate bodily injury. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. CAL. CONST. art. I, §12(b).

14. *Id.*

15. *Id.*

16. *Id.* §12(c).

17. *Id.*

18. *Id.*

## **Criminal Procedure; restriction on disclosure**

Penal Code §1102.7 (new).

SB 1122 (Royce); 1984 STAT. Ch 236

Under existing law the prosecution must disclose to the defense all evidence, including the names, addresses, and statements of witnesses.<sup>1</sup> Chapter 236 provides that, absent a showing of good cause,<sup>2</sup> the prosecution is not required to disclose to the defendant the address or telephone number of any victim or witness.<sup>3</sup> Chapter 236, however, requires the prosecution to disclose the address and telephone number of all victims or witnesses if the defendant elects to proceed pro se.<sup>4</sup>

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1. CAL. PENAL CODE §1102.5(b).

2. Good cause is to be determined by the court. *Id.* §1102.7.

3. *Id.*

4. *Id.*

## **Criminal Procedure; insanity**

Penal Code §§1026, 1026.1, 1026.2, 1026.3, 1026.5, 1601, 1603, 1609, 1610, 1612 (amended); §1611\* (repealed); Welfare & Institutions Code §702.3 (amended).

SB 1984 (Mello); 1984 STAT. Ch 1488

With the enactment of Chapter 1488 the Legislature has amended the law regarding defendants found not guilty by reason of insanity.<sup>1</sup> The provisions of Chapter 1488 revise (1) outpatient status,<sup>2</sup> (2) release hearings,<sup>3</sup> and (3) extension of commitment.<sup>4</sup> Chapter 1488 also eliminates the possibility of parole for a defendant found not guilty by reason of insanity.<sup>5</sup>

### *Outpatient Status*

Under prior law, any adult or juvenile defendant who had been

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\* CAL. PENAL CODE §1611 as repealed by 1984 Cal. Stat. c. 1488, §11, at \_\_\_\_\_ becomes operative on January 1, 1986.

1. See CAL. PENAL CODE §§1026.2, 1026.3, 1026.5, 1601, 1603, 1609, 1610, 1612; CAL. WELF. & INST. CODE §702.3.

2. CAL. PENAL CODE §1601(a); see also CAL. WELF. & INST. CODE §702.3 (juveniles).

3. CAL. PENAL CODE §1026.2.

4. *Id.* §1026.5.

5. 1984 Cal. Stat. c. 1488, §9, at \_\_\_\_\_ (repealing CAL. PENAL CODE §1611).

charged with and found incompetent, guilty, or not guilty by reason of insanity of certain specified crimes<sup>6</sup> could be placed on outpatient status after having been confined for a period of at least ninety days in a state hospital or other treatment facility.<sup>7</sup> Chapter 1488, however, provides that the defendant must be confined at least 180 days before release to outpatient status is granted.<sup>8</sup>

### *Release Hearing*

Existing law provides that a defendant found not guilty by reason of insanity can apply for a release hearing upon the grounds that sanity has been restored.<sup>9</sup> Chapter 1488 provides that when a defendant files an application for a release hearing, the court must hold a hearing to determine if the defendant would pose a danger to the health and safety of others if placed under supervision and treatment in the community.<sup>10</sup> If the court determines that the defendant will not be a danger, placement in an appropriate local mental health program must be ordered for a period of one year.<sup>11</sup> At the end of that one year period, the court will conduct a trial to determine if the sanity of the defendant has been restored.<sup>12</sup> Under existing law, if the defendant's sanity is found to have been restored<sup>13</sup> then the defendant is to be returned to the court from which he was committed for further proceedings.<sup>14</sup>

Chapter 1488 further provides that before placing a defendant, who has applied for a release hearing, in a local mental health program, the county mental health director must submit to the court a written recommendation stating which local mental health program is most appropriate for the defendant.<sup>15</sup> If the court does not accept the county mental health directors recommendation, the court must specify the reasons for non-acceptance on the court record.<sup>16</sup> Chapter 1488 further

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6. CAL. PENAL CODE §1601(a) (listing of specified crimes).

7. 1980 Cal.Stat. c. 547, §17, at 1518 (amending CAL. PENAL CODE §1601); *see also* 1978 Cal. Stat. c. 867, §1, at 2729 (adding CAL. WELF. & INST. CODE §702.3) (juveniles).

8. CAL. PENAL CODE §1601(a); *see also* CAL. WELF & INST. CODE §702.3 (juveniles).

9. CAL. PENAL CODE §1026.2(a).

10. *Id.* § 1026.2(e).

11. *Id.* If the defendant is on parole or outpatient status and has been on parole or outpatient status for at least one year, the defendant will be deemed to have completed the required one year in an appropriate local mental health program. *Id.* §1026.2(f).

12. *Id.* §1026.2(e).

13. *Id.* Restored means that the defendant is no longer a danger to oneself or others. Notice of the hearing is to be given to the prosecuting attorney, county mental health director, and to the Director of Mental Health. *Id.*

14. *Id.* §1372(a)(2).

15. *Id.* §1026.2(g).

16. *Id.*

provides that if the court determines that the defendant should be transferred to a local mental health program, the county mental health director must make the necessary placement arrangements.<sup>17</sup> The defendant must be transferred to the local mental health program within twenty-one days after the court orders the defendant transferred unless good cause for not doing so is indicated.<sup>18</sup>

Under prior law, a defendant found not guilty by reason of insanity could apply for a release hearing upon the grounds that sanity has been restored after having been confined, placed on outpatient status,<sup>19</sup> or placed on parole,<sup>20</sup> for at least ninety days.<sup>21</sup> Chapter 1488 extends the period of time a defendant must be confined, placed on outpatient status, or on parole before an application for a release hearing may be *granted* to 180 days.<sup>22</sup>

### *Extension of Commitment*

Prior law permitted a court to commit a defendant beyond the time prescribed by law if the defendant had been convicted of certain specified crimes<sup>23</sup> and presented a substantial danger to others.<sup>24</sup> Chapter 1488 provides that if the defendant is committed for *any felony* and presents a substantial danger to others, the defendant will be recommitted for an additional two years to the facility in which the patient was confined.<sup>25</sup>

Under prior law, the prosecuting attorney was required to file a petition for extended commitment no later than ninety days before expiration of the original commitment.<sup>26</sup> Furthermore, a hearing on the matter could not be commenced later than thirty days prior to the defendant's scheduled release date.<sup>27</sup> Under Chapter 1488, if good cause is shown, the prosecuting attorney may file a petition later than ninety days<sup>28</sup> and the hearing may commence later than thirty days before the defendant's scheduled release.<sup>29</sup>

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17. *Id.* §1026.2(h).

18. *Id.*

19. CAL. PENAL CODE §§1600-1614 (outpatient status).

20. See 1982 Cal. Stat. c. 930, §2, at 3385 (amending CAL. PENAL CODE §1611). Compare *id.* with 1984 Cal. Stat. c. 1488, §9, at\_\_\_\_, (repealing CAL. PENAL CODE §1611).

21. 1982 Cal. Stat. c. 930, §1, at 3384 (amending CAL. PENAL CODE §1026.2).

22. CAL. PENAL CODE §1026.2(d).

23. 1982 Cal. Stat. c. 650, §1, at 2665 (amending CAL. PENAL CODE §1026.5) (listing of specified crimes).

24. 1982 Cal. Stat. c. 650, §1, at 2665 (amending CAL. PENAL CODE §1026.5).

25. CAL. PENAL CODE §1026.5(b)(6).

26. See 1982 Cal. Stat. c. 650, §1, at 2666 (amending CAL. PENAL CODE §1026.5).

27. *Id.* A hearing on the matter could commence later if defendant waived the protection. *Id.*

28. CAL. PENAL CODE §1026.5(b)(2).

29. *Id.* §1026.5(b)(4).

### Parole

Chapter 1488 repeals the provisions for placing a defendant on parole from a state hospital or other treatment facility after being found not guilty by reason of insanity.<sup>30</sup> The court must determine whether a defendant on parole before the enactment of Chapter 1488 must be placed on outpatient status or be returned to inpatient status.<sup>31</sup>

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30. 1982 Cal. Stat. c. 547, §17, at 1521 (amending CAL. PENAL CODE §1611). Compare *id.* with 1984 Cal. Stat. c. 1488, §11, at \_\_\_\_ (repealing CAL. PENAL CODE §1611).

31. 1984 Cal. Stat. c. 1488, §12, at \_\_\_\_\_. Sections 11 and 12 of 1984 Cal. Stat. c. 1488, do not become operative until January 1, 1986.

### Criminal Procedure; role of psychologists

Penal Code §§5058.5, 5068.5 (new); §§825.5, 5068, 5079 (amended).  
SB 1621 (Torres); 1984 STAT. Ch 1123

Under existing law, a *psychiatrist* employed by a prisoner can visit the prisoner while in custody.<sup>1</sup> Chapter 1123 additionally authorizes a *psychologist* employed by a prisoner to visit the prisoner while in custody, if the psychologist (1) is licensed to practice in California, (2) holds a doctoral degree, and (3) has two years of experience in diagnosis and treatment.<sup>2</sup> Furthermore, Chapter 1123 provides that state prison psychologists, as well as psychiatrists, may (1) prescreen inmates for mental disorders, (2) determine the mental competency of inmates to participate in classification hearings, (3) evaluate parolees during temporary detention, (4) determine whether treatment should be a condition of parole, and (5) perform other services consistent with their licenses.<sup>3</sup>

Chapter 1123 requires mental health treatment within the state prison system to be supervised by a psychiatrist, or a psychologist who has a doctoral degree and at least two years of experience.<sup>4</sup> Chapter 1123, however, limits a psychologist's supervisory powers by requiring a

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1. Compare CAL. PENAL CODE §825.5 with 1972 Cal. Stat. c. 1077, §1, at 2011 (enacting CAL. PENAL CODE §825.5). See generally *Review of Selected 1972 California Legislation*, 4 PAC. L.J. 413 (1973) (visitation by psychiatrist).

2. CAL. PENAL CODE §825.5.

3. *Id.* §5058.5. Compare CAL. BUS. & PROF. CODE §§2903 and 2904 (listing services consistent with license to practice psychology) with *id.* §2051 (psychiatrist can use any method to treat physical and mental conditions).

4. CAL. PENAL CODE §5079.

psychiatrist to be available to assume responsibility for acts that only may be performed by a physician.<sup>5</sup>

Prior law permitted persons licensed in any state to perform mental health services in the California prison system.<sup>6</sup> Chapter 1123 requires persons performing mental health services in the state prison system to be licensed to practice in California,<sup>7</sup> unless they are (1) psychologists employed on January 1, 1985, who continue in the same class and department;<sup>8</sup> (2) persons granted a waiver to gain qualifying experience for a psychologist license;<sup>9</sup> or (3) persons recruited from out-of-state who qualify to take the licensing examination.<sup>10</sup>

Prior law required the Department of Corrections to prepare a psychiatric or psychological report for the Community Release Board whenever the diagnosis of an inmate committed for not more than one year and one day indicated a report was necessary.<sup>11</sup> Chapter 1123 requires that a written report prepared by a psychiatrist or psychologist licensed in California be given to the Community Release Board prior to the release of any inmate committed for not more than one year and one day.<sup>12</sup>

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5. See *id.* CAL. BUS. & PROF. CODE §2904 (prohibiting a psychologist from prescribing drugs, performing surgery, or administering electro-convulsive therapy). See also *id.* §2051 (authorizing a physician to use any and all methods for the treatment of diseases, injuries, and other physical and mental conditions). See Dix and Poythress, *Propriety of Medical Dominance of Forensic Mental Health Practice: The Empirical Evidence*, 23 ARIZ. L. REV. 961, 962-63 (1981) (noting American Medical Association opposition to psychologists having treatment roles independent of supervision by a psychiatrist). But see CAL. PENAL CODE §5079 (providing that state prison system psychiatric clinics may be directed by a psychologist).

6. Compare CAL. PENAL CODE §5068 with 1977 Cal. Stat. c. 165, §82, at 675 (amending CAL. PENAL CODE §5068). Compare CAL. PENAL CODE §5079 with 1953 Cal. Stat. c. 1666, §27, at 3396 (amending CAL. PENAL CODE §5079).

7. CAL. PENAL CODE §5068.5(a).

8. *Id.* §5068.5(b) (exception does not apply to intermittent personnel).

9. *Id.* (waiver not to exceed two years from date employment began).

10. *Id.* (waiver not to exceed one year from date employment began).

11. 1977 Cal. Stat. c. 165, §82, at 675 (amending CAL. PENAL CODE §5068).

12. CAL. PENAL CODE §5068. See CAL. PENAL CODE §1168(b) (sentencing not fixed for inmate committed for not more than one year and one day).

## **Criminal Procedure; domestic violence—confiscation of weapons**

Penal Code §12028.5 (new).

AB 3436 (Wright); 1984 STAT. Ch 901

Existing law permits any citizen over the age of eighteen to possess

any pistol, revolver, or firearm at a place of residence.<sup>1</sup> Under prior law, a sheriff or police officer was authorized to take custody of a firearm incident to domestic violence only if a crime had been committed, attempted, or charged.<sup>2</sup>

With the enactment of Chapter 901, a sheriff, undersheriff, deputy sheriff, or police officer is authorized to take temporary custody of firearms<sup>3</sup> at the scene of an incident of domestic violence<sup>4</sup> involving a threat to human life or a threat of physical assault.<sup>5</sup> Chapter 901 authorizes temporary custody only if the firearm is in plain sight or discovered pursuant to a consensual search necessary for the protection of the peace officer or others present.<sup>6</sup> Chapter 901 also provides that upon taking custody of the firearm, the peace officer must give the owner or possessor a receipt that can be exchanged for the firearm at a later date.<sup>7</sup> Finally, Chapter 901 provides that any firearm that is taken into custody which was stolen must be returned to the lawful owner as soon as evidentiary uses have been served.<sup>8</sup>

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1. CAL. PENAL CODE §12026.

2. *Id.* §846. *But see* CAL. GOV'T CODE §§26600, 26602 (providing sheriffs with the general authority to preserve the peace and suppress any breaches of the peace).

3. CAL. PENAL CODE §12001 (definition of firearm).

4. *Id.* §§12028.5(a); 1000.6 (definition of domestic violence).

5. *See id.* §12028.5(a).

6. *See Id.*

7. *Id.* If the firearm is not retained for evidence related to criminal charges arising out of the domestic violence incident or is not retained because it was illegally possessed, the firearm must be made available to the owner or the receipt holder not later than 72 hours nor sooner than 48 hours. *Id.* Any firearms taken into custody and held by a police or sheriff's department for longer than 12 months shall be sold or destroyed as provided in Penal Code section 12028. CAL. PENAL CODE §12028.5(b), (c).

8. *Id.* §12028.5(c).