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Criminal Procedure

University of the Pacific; McGeorge School of Law

Criminal Procedure

Criminal Procedure; insane offenders—release proceedings

Penal Code §§1026.2, 1026.5, 1611 (amended); §1603 (amended, repealed and new).
AB 2944 (Bosco); STATS. 1982, Ch 1232
Support: Department of Finance; Department of Mental Health
AB 3388 (Goggin); STATS. 1982, Ch 650
(Effective August 27, 1982)
Support: Department of Finance; Department of Mental Health
Opposition: California Medical Association
SB 858 (Russel); STATS. 1982, Ch 930
Support: Department of Mental Health; Los Angeles County District Attorney

Existing law provides that a defendant who is found not guilty by reason of insanity[1] will either be confined in a treatment facility[2] or placed on outpatient status,[3] unless it appears to the court that the defendant's sanity has been fully restored.[4] In addition, a defendant confined to a treatment facility may be released upon (1) a determination that sanity has been restored;[5] (2) expiration of the maximum term of commitment, unless the term has been extended;[6] or (3) transfer to outpatient status or a parole treatment program.[7] Chapters 650, 930 and 1232 modify the procedures related to these release alternatives.[8]

Under existing law the determination that a confined person's sanity has or has not been restored[9] is made at a noticed hearing[10] following

1. CAL. PENAL CODE §1026(a) (the defendant must be found to have been insane at the time the offense was committed). *See generally* 4 CAL. CRIM. DEF. PRAC. (MB) §§86.01-86.04 (discussion of insanity trial procedures).
2. *See* CAL. PENAL CODE §1026(a) (the facility will be either a state hospital for the mentally disordered or any other appropriate public or private facility approved by the county mental health director).
3. *See generally id.* §§1600-14 (procedures pertaining to outpatient status for mentally disordered and developmentally disabled offenders).
4. *Id.* §1026(a).
5. *See generally id.* §1026.2.
6. *See generally id.* §1026.5.
7. *Id.* §1026.1. *See generally id.* §§1600-14.
8. *See id.* §§1026.2, 1026.5, 1603, 1611.
9. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §507 (Supp. 1978) (discussion of standard for release).
10. CAL. PENAL CODE §1026.2 (provides for notice to the county mental health director and the Director of Mental Health).

an application[11] for the person's release.[12] Chapter 930 extends the notice requirement to include notice to the prosecuting attorney.[13] In addition, Chapter 930 provides that if the release application is not made by the medical director of the state hospital or treatment facility where the person is committed, the court may not take any action on the application without first obtaining the director's written recommendation.[14]

Under existing law, a person committed to a treatment facility or placed on outpatient status may not be kept in actual custody for longer than the maximum term of commitment,[15] unless a petition for extended commitment is granted.[16] Under prior law, a prosecuting attorney could file a petition for extended commitment only if the medical director of a mental institution submitted a case file and supporting evaluations to the prosecuting attorney indicating that the offender presented a substantial danger of physical harm to others.[17] This effectively left the decision of whether or not to petition up to the various medical directors.[18] In apparent response to concern over the consistency with which these petitions have been filed,[19] Chapter 650 *requires* medical directors to submit their opinions[20] to prosecuting attorneys no later than 180 days prior to the expiration of the maximum term of commitment.[21] If requested by the prosecuting attorney, the opinions must be accompanied by supporting evaluations and relevant hospital records.[22]

Under existing law, a person acquitted of the commission of a speci-

11. *See id.* (the application may be by the confined person, or by the medical director of the treatment facility, or by the county mental health director when the person is on outpatient status).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* §1026.5(a) (defines the maximum term of commitment). *See generally In re* Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978) (the court held the institutional confinement may not exceed the maximum term for the underlying offense); 4 CAL. CRIM. DEF. PRAC. (MB) §86.10[6] (discussing duration of commitment under these provisions).
16. *See id.* §1026.5(b)(1) (persons who may be subject to extended commitment must have been charged with the commission of a specified felony offense). The specified offenses are murder; mayhem; kidnapping with intentional infliction of great bodily injury; first degree robbery or robbery when the victim suffers great bodily injury; arson; first degree burglary; assault with intent to commit murder; aggravated assault with intent to commit murder; aggravated assault; possessing or exploding destructive devices; or committing a felony involving death, great bodily injury or a serious threat of bodily harm. *Id. See generally* Comment, *Outpatient Status: Beyond the Term of Commitment*, 13 PAC. L.J. 1189 (1982); 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 445 (1980).
17. CAL. STATS. 1980, c. 1117, §6.1, at 3592 (amending CAL. PENAL CODE §1026.5).
18. *See id.*
19. *See* CAL. STATS. 1982, c. 650, §3, at —.
20. CAL. PENAL CODE §1026.5(b)(2). The opinion concerns whether or not the disordered person represents a substantial danger of physical harm to others. *Id.* §1026.5(b)(1).
21. *Id.* §1026.5(b)(2).
22. *Id.*

fied felony[23] by reason of insanity may not be considered for release to outpatient status until that person has been confined in a treatment facility for at least 90 days.[24] This release to outpatient status is predicated upon the fulfillment of certain conditions.[25] Chapter 1232 provides that these conditions include notice to the victim or next of kin of the victim of the offense for which the person was committed, if a request for notice has been filed with the court.[26] In addition, the director of the mental institution where the person is confined must notify the victim or next of kin of the victim at the start of any program in which the committed person is to be allowed any type of day release that is unattended by the staff of the facility.[27]

Existing conditions under which a person may be placed on a parole treatment program[28] are comparable to those relating to outpatient status.[29] Similarly, a request for revocation of parole status or outpatient treatment may be submitted if the subject person appears to require extended inpatient treatment or refuses to accept supervision.[30] Pending the revocation hearing, a person on outpatient status may be confined in a treatment facility if, in the opinion of the county mental health director, a delay in hospitalization would pose an imminent risk of harm to the person or another.[31] Chapter 930 enacts a similar provision that authorizes a parole supervisor to request a peace officer to cause an imminently dangerous person to be transferred to a treatment facility, pending the revocation hearing.[32] A person hospitalized under this provision is entitled to judicial review and an explanation of rights.[33]

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23. *Compare id.* §1026.5 *with id.* §1601(a) (both sections specify the same offenses). *See* note 16 *supra*.

24. *See id.* §1026.2. *See generally* 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 360 (1981).

25. *See* CAL. PENAL CODE §1603. The specified conditions are as follows: (1) the director of the treatment facility must advise the court that the defendant is no longer likely to be a danger to others and will benefit from outpatient status; (2) the county mental health director must advise the court that the defendant will benefit from outpatient status and must identify an appropriate program of supervision and treatment; (3) after specified notice and a hearing, the court must specifically approve the recommendation and plan for outpatient status. *Id.*

26. *Id.* §1603(c).

27. *Id.*

28. *See generally id.* §1611 (a court may order parole treatment if a county does not have an appropriate outpatient status program, or if the county refuses to assume treatment responsibility).

29. *Compare id.* §1611(a) *with id.* §§1602, 1603.

30. *See id.* §§1608, 1609, 1611(b).

31. *Id.* §1610.

32. *See id.* §1611(c)(1) (the parole supervisor must notify the court in writing of the person's admission as well as the factual basis for the opinion that an immediate return to inpatient treatment was necessary).

33. *Id.* §1611(c)(2).

In summary, Chapters 650, 930 and 1232 further safeguard society against the premature release of dangerously insane persons by providing for (1) increased prosecutor participation in release and extended commitment proceedings,[34] (2) victim notification,[35] and (3) confinement pending the parole revocation determination.[36]

34. *See id.* §§1026.2, 1026.5.
35. *Id.* §1603.
36. *Id.* §1611.

Criminal Procedure; weapons—search and seizure, crimes and penalties, probation, disposal, kidnapping

Penal Code §§417.1, 417.6, 417.8, 833.5, 1203.095, 12001.6, 12021.1 (new); §§207, 245, 246, 417, 12021, 12022, 12022.5, 12025, 12028, 12031 (amended).
AB 614 (Statham); STATS. 1982, Ch 167
Support: California Highway Patrol; Department of Corrections; Lassen County Peace Officers Association
AB 846 (Levine); STATS. 1982, Ch 136
(*Effective March 26, 1982*)
Support: Attorney General; California Peace Officers Association; Department of Finance
AB 3314 (Levine); STATS. 1982, Ch 1404
Support: California Peace Officers Association; Department of Corrections; Department of Finance
SB 561 (Davis); STATS. 1982, Ch 142
Support: Attorney General; California District Attorneys' Association; Peace Officers Research Association of California
Opposition: Department of Corrections; Department of Finance

In an apparent effort to deter the increasing use of firearms and to protect peace officers and firefighters from this increasing use, the Legislature has enacted Chapters 136, 142, 167 and 1404.[1] To accomplish this goal, Chapter 142 apparently follows the holding of *In re Tony C.*[2] by authorizing peace officers to detain and search individuals suspected of possessing a firearm or other deadly weapon.[3] Chapters 136 and 142

1. *See* CAL. STATS. 1982, c. 136, §14, at —; Telephone conversation with Jim Rushford, Legislative Aide to Senator Davis, June 22, 1982 (notes on file at the *Pacific Law Journal*).
2. 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).
3. *Compare* CAL. PENAL CODE §833.5 *with In re* Tony C., 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978).

create separate punishment classifications for the illegal use and possession of firearms.[4] Additionally, under Chapter 136, it is now unlawful for any person previously convicted of any offense that constitutes the violent use of a firearm[5] to possess or control a concealable firearm.[6]

Chapter 136 imposes minimum sentences for persons convicted of firearm violations,[7] and, except in unusual circumstances,[8] conditions a grant of probation or suspension on a specified period of mandatory imprisonment being served.[9] Moreover, Chapter 142 requires that firearms[10] or deadly weapons[11] used in violation of specified provisions[12] are now to be disposed of under appropriate procedures.[13] Additionally, in an unrelated change Chaper 1404 apparently follows the holding in *People v. Oliver*[14] by allowing the taking of a minor unaccompanied by force for the purpose of sexual molestation to be prosecuted as kidnapping.[15]

Detention

The United States Supreme Court in *Terry v. Ohio*[16] stated that a suspect could be seized and frisked for weapons if a police officer had a reasonable suspicion that criminal activity was occurring and the officer had a reasonable belief that the suspect was armed and dangerous.[17] In *In re Tony C.*, the California Supreme Court held that to justify the stop or detention the officer must entertain specific and articulable facts that a crime has or will take place and that the individual is involved in the criminal activity.[18]

Chapter 142 apparently follows this case law by statutorily permitting a peace officer to detain and search a person if the officer has rea-

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4. *Compare* CAL. PENAL CODE §245 *and* CAL. STATS. 1982, c. 136, §1, at — (amending CAL. PENAL CODE §245) *with* CAL. STATS. 1980, c. 1340, § 3.2, at 4719 (amending CAL. PENAL CODE §245); *Compare* CAL. PENAL CODE § 417 *with* CAL. STATS. 1977, c. 667, §1, at 2184 (amending CAL. PENAL CODE §417).
5. CAL. PENAL CODE §12021.1(b) (definition of violent offense).
6. *Id.* §12021.1(a).
7. *Id.* §§246, 417, 1203.095, 12021.1, 12025.
8. *Id.* §§1203.095(b), 12021.1(d), 12025(e), 12031(a).
9. *Id.* §§1203.095(a), 12021.1(a), (c), 12025(a), (b), (d), 12031(a).
10. *Id.* §12001 (definition of firearm).
11. People v. Mortenson, 210 Cal. App. 2d 575, 582, 26 Cal. Rptr. 746, 750 (1962) (definition of deadly weapon).
12. CAL. PENAL CODE §§245(d), 417.6(b), 833.5(a), 12022(b), 12022.5.
13. *Id.* §12028.
14. *See* 55 Cal. 2d 761, 768, 361 P.2d 593, 597, 12 Cal. Rptr. 865, 869 (1961).
15. CAL. PENAL CODE §207(b).
16. 392 U.S. 1 (1967).
17. 392 U.S. at 27.
18. 21 Cal. 3d at 893, 582 P.2d at 959, 148 Cal. Rptr. at 368.

sonable cause[19] to believe that a violation pertaining to firearms or deadly weapons has occurred.[20] If the officer reasonably concludes the person detained may be armed and dangerous, the officer may conduct a limited search[21] of the suspect for firearms or weapons.[22] The officer, however, cannot search the person at the person's residence or place of business unless there is a search warrant or other grounds giving reasonable cause.[23]

Crimes & Penalties

A. Assault with Firearms

Under prior law, a person who committed an assault[24] with a deadly weapon or instrument[25] or by any means of force[26] likely to produce great bodily injury[27] was punished by either a state prison term of two, three, or four years, or a county jail term of not more than one year, a fine ranging up to $5,000, or both fine and imprisonment.[28] Chapter 142 retains these penalties for assault with a deadly weapon other than a firearm but creates a mandatory jail term for any person who commits an assault with a firearm.[29] A person who assaults another person with a firearm is subject to either a state prison term of two, three, or four years or a county jail term ranging *between six months to one year*, a fine ranging up to $5,000, or both a fine and imprisonment.[30]

Prior law provided that if a person committed an assault with a deadly weapon or instrument upon a peace officer[31] or firefighter[32] and knew or should reasonably have known that the officer or firefighter was performing official duties, the assaulting person was to be sen-

19. CAL. PENAL CODE §833.5(a) (reasonable cause to detain requires there to be specific and articulable facts available to warrant detention).

20. *Id.* §833.5(a).

21. *See generally* People v. Juarez, 35 Cal. App. 3d 631, 110 Cal. Rptr. 865 (1973) (discussion of the extent of a limited search).

22. CAL. PENAL CODE §833.5(b).

23. *Id.* §833.5(d).

24. *Id.* §240 (definition of assault).

25. *See generally* People v. Claborn, 224 Cal. App. 2d 38, 36 Cal. Rptr. 132 (1964) (determines when an instrument is capable of being a deadly weapon).

26. *See generally* People v. Mueller, 147 Cal. App. 2d 233, 305 P.2d 178 (1956) (the gravamen of the crime defined by Penal Code Section 245 is the likelihood that the force applied or attempted to be applied will result in great bodily injury).

27. People v. Lira, 119 Cal. App. 3d 837, 860, 174 Cal. Rptr. 207, 218 (1981) (definition of great bodily injury).

28. CAL. STATS. 1980, c. 1340, §3.2, at 4719 (amending CAL. PENAL CODE §245).

29. *Id.* §245(a)(2). Chapter 136 enacted identical language that took effect March 26, 1982. CAL. STATS. 1982, c. 136, §1, at — (amending CAL. PENAL CODE §245).

30. CAL. PENAL CODE §245(a)(2).

31. *Id.* §245(e) (persons designated as peace officers).

32. *Id.* §245.1 (definition of fireman).

tenced to a state prison for a term of three, four, or five years.[33] Chapter 142 retains these penalties for assaulting a peace officer or firefighter with a deadly weapon other than a firearm but creates a more severe punishment if the assault is committed with a firearm.[34] The use of a firearm by a person assaulting a peace officer or firefighter will subject the person to a state prison sentence of either four, six, or eight years.[35] Finally, Chapter 1404 provides that an additional state prison term of two years may be imposed on a person convicted of assault with a firearm, even though the use of the firearm was an element of the offense.[36]

B. Exhibition of Firearms

Prior law made the unlawful use of a firearm or deadly weapon in a fight or quarrel, or the drawing or exhibiting of the weapon in a rude or threatening manner,[37] except in self-defense,[38] a misdemeanor.[39] Chapter 136 retains the misdemeanor classification, but distinguishes between the illegal use of a weapon and a firearm.[40] The illegal use of a weapon, other than a firearm, against an individual is still a misdemeanor.[41] If a firearm is drawn or exhibited in a rude or threatening manner, however, Chapter 136 requires that the person serve a mandatory county jail term of between three and six months, and the person may, in addition, be fined up to $500.[42]

Under existing law, the drawing or exhibiting of a firearm in a rude or angry manner against a peace officer by a person who knows or should know the officer is performing official duties is a felony punishable by a jail term not to exceed one year.[43] Chapter 136 establishes a *minimum* six month sentence for this offense.[44] In addition, Chapter 142 provides that any person who draws or exhibits a firearm or deadly weapon with the intent to resist or prevent the arrest of any person by a peace officer is subject to a state prison term of two, three, or four years.[45]

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33. CAL. STATS. 1980, c. 1340, §3.2, at 4719.
34. CAL. PENAL CODE §245(c).
35. *Id.*
36. *Id.* §12022.5.
37. *See generally* People v. Mercer, 113 Cal. App. 3d 803, 169 Cal. Rptr. 897 (1980) (example of exhibiting a weapon in a rude and threatening manner).
38. CAL. PENAL CODE §693 (definition of self-defense).
39. CAL. STATS. 1977, c. 667, §1, at 2184 (amending CAL. PENAL CODE §417).
40. *Compare* CAL. PENAL CODE §417 *with* CAL. STATS. 1977, c. 667, §1, at 2184.
41. CAL. PENAL CODE §417(a)(1).
42. *Id.* §417(a)(2).
43. *Id.* §417(b).
44. *Id.*
45. *Id.* §417.8.

Prior to the enactment of Chapter 167 there was no specific prohibition against the drawing or exhibiting of a firearm in a rude or threatening manner in the presence of a reserve or auxiliary peace officer.[46] Chapter 167 now makes the drawing or exhibiting of a firearm in the presence of a reserve or auxiliary sheriff, city police officer, or deputy sheriff a felony.[47] The punishment for this offense is imprisonment not to exceed one year.[48] Chapter 142 increases the possible punishment if serious bodily injury[49] is intentionally inflicted by the person exhibiting or drawing a firearm or deadly weapon when committing these specified offenses.[50] The person will be sentenced to a term not to exceed one year in the county jail or imprisonment in the state prison.[51]

C. Minimum Sentences & Probation

Chapter 136 specifies minimum sentences of either three or six months for certain offenses involving firearms,[52] and conditions any grant of probation or suspension of sentence upon serving a minimum prison term.[53] The only exception to serving a minimum sentence under the provisions of Chapter 136 is if the court determines in unusual cases that the interests of justice would be better served by foregoing the minimum imprisonment requirement.[54]

A minimum sentence of six months imprisonment is now mandatory for any person convicted of a malicious[55] and willfull[56] discharge of a firearm at an inhabited[57] dwelling house, occupied building, occupied motor vehicle, or inhabited housecar or camper.[58] Additionally, a person who has been convicted of (1) assault on another person or a peace officer or firefighter with a firearm,[59] (2) discharging intentionally a firearm at inhabited dwellings or vehicles,[60] or (3) drawing or exhibiting a firearm in a rude or threatening manner in the presence of a peace

46. *Compare* CAL. PENAL CODE §417.1 *with id.* §417.
47. *Id.* §417.1.
48. *Id.*
49. *Id.* §417.6(a). Chapter 142 defines serious bodily injury as serious impairment of physical condition. *Id.*
50. *Id.* §417.6(a); *see id.* §§417, 417.1, 417.8.
51. *Id.* §417.6(a).
52. *Id.* §§246, 417, 12021.1, 12025(d), 12031(a).
53. *Id.* §§1203.095(a), 12021.1(a), (c), 12025(a), (b), (d), 12031(a). *See generally id.* §1203.1 (judge may make serving a prison term a condition of probation).
54. *Id.* §§1203.095(b), 12021.1(d), 12025(e), 12031(a).
55. *Id.* §7(4) (definition of maliciously).
56. *Id.* §7(1) (definition of willfully).
57. CAL. PENAL CODE §246 (definition of inhabited).
58. *Id.* §246.
59. *Id.* §245(a)(2), (c).
60. *Id.* §246.

officer[61] must now serve a minimum six month county jail sentence as a condition for a grant of probation or suspension of sentence,[62] unless in the discretion of the court, the interests of justice would be better served by granting the probation.[63]

Chapter 136 creates a minimum six month sentence for any person who has been convicted of a specified violent offense[64] and who also owns or possesses a concealable[65] firearm.[66] A grant of probation or suspension of sentence upon conviction of this offense is conditioned upon serving six months in jail.[67] This mandatory jail term also applies to a juvenile convicted of the offense if prosecuted as an adult.[68] If the court determines the interests of justice would be better served, probation without a jail term may be granted.[69]

Additionally, Chapter 136 requires that a minimum three month county jail sentence be imposed as a condition[70] for granting probation or suspending a sentence when any of the following crimes have been committed: (1) when a person has been convicted of a felony and is later convicted for the unauthorized carrying of a weapon,[71] (2) when a person is convicted of a specified misdemeanor offense[72] and is later convicted of the unauthorized carrying of a weapon,[73] (3) when a per-

61. *Id.* §417(b).
62. *Id.* §1203.095(a).
63. *Id.* §1203.095(b).
64. *Id.* §12021.1(b) (the specified offenses are murder or voluntary manslaughter; mayhem; rape; sodomy by force, violence, duress, menace, or threat of great bodily harm; oral copulation by force, violence, duress, menace, or threat of great bodily harm; lewd acts on a child under the age of fourteen years; any felony punishable by death or imprisonment in the state prison for life; any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, which has been charged and proven, or any felony in which the defendant uses a firearm which use has been charged and proven; attempted murder; assault with intent to commit rape or robbery; assault with a deadly weapon or instrument on a peace officer; assault by a life prisoner on a non-inmate; assault with a deadly weapon by an inmate; arson; exploding a destructive device or any explosive causing great bodily injury; exploding a destructive device or any explosive with intent to murder; robbery; kidnapping; taking a hostage by an inmate of a state prison; attempt to commit a felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally used a dangerous or deadly weapon; escape from a state prison by use of force or violence; assault with a deadly weapon or force likely to produce great bodily injury; any attempt to commit a crime listed above other than an assault; any offense designated as a violent use of a firearm).
65. *Id.* §12001 (definition of concealable weapon).
66. *Id.* §12021(a), (b).
67. CAL. PENAL CODE §12021.1(a).
68. *Id.* §12021.1(c).
69. *Id.* §12021.1(d).
70. *See Ex parte* Hays, 120 Cal. App. 2d 308, 310, 260 P.2d 1030, 1032 (1953) (condition imposed as part of probation that first eight months of probationary period be served in county jail is valid).
71. *Id.* §12025(a), (b).
72. *Id.* §12001.6 (the misdemeanor offenses are assault upon a person with a firearm or two or more violations for drawing or exhibiting a firearm in a rude or threatening manner or the illegal use of a firearm in a fight or quarrel).
73. *Id.* §12025(a), (b), (d).

son who has been convicted of the violent use of a firearm[74] and is later convicted of carrying either upon the person or in a vehicle, a loaded firearm in specified public places,[75] or (4) when a person is convicted of drawing or exhibiting a firearm in a rude, angry, or threatening manner against another person.[76] This imposition of minimum sentences may be waived in unusual cases when the court determines that probation should be granted in the interests of justice.[77]

Disposal of Weapons

Existing law outlines specified procedures for the disposition or destruction of firearms and weapons.[78] Under prior law, weapons could be deemed nuisances[79] and disposed of only if the defendant was convicted.[80] Chapter 142 provides that for purposes of declaring the weapon a nuisance, a finding that the defendant committed the offense but was insane at the time will suffice as a conviction with regard to disposition of the weapon.[81] Additionally, Chapter 142 *requires* that any weapon or firearm owned by the defendant and used in violation of specified provisions[82] be declared a nuisance and be either disposed[83] of or destroyed by the police or sheriff's department.[84]

Kidnapping

Existing kidnapping law provides that a person who *forcibly* steals, takes, or arrests another person and carries that person into another country, state, county, or another part of the same county, is guilty of kidnapping.[85] In *People v. Oliver*,[86] the California Supreme Court held that a kidnapping occurred when a person, who by reason of immaturity or mental condition was incapable of giving legal consent, was taken without the use of force for an illegal purpose or intent.[87] Chapter 1404 partially follows this holding by providing that a person, who for the purpose of commiting a lewd or lascivious act upon the body of a child under the age of 14, hires, persuades, entices, decoys, or seduces

74. *Id.* §12031(a), 12001.6.
75. *Id.* §12031(a).
76. *Id.* §417(a)(2).
77. *Id.* §§1203.095(b), 12025(e), 12031(a).
78. *Id.* §12028.
79. *Id.* §370 (definition of nuisance).
80. CAL. STATS. 1970, c. 1057, §1, at 1887 (amending CAL. PENAL CODE §12028).
81. CAL. PENAL CODE §12028(b).
82. *Id.* §§245(d), 417.6(b), 833.5(e), 12022, 12022.5.
83. *Id.* §12028(c).
84. *Id.*
85. CAL. PENAL CODE §207.
86. 55 Cal. 2d 761, 12 Cal. Rptr. 865, 361 P.2d 593 (1961).
87. *Id.* at 768, 12 Cal. Rptr. at 869, 361 P.2d at 597.

by false promises or misrepresentations any child under the age of 14 to leave this country, state, county, or go to another part of the same county is guilty of kidnapping.[88]

Conclusion

The enactment of Chapters 136, 142, and 167 reflects the concern of the Legislature over the increasing use of firearms against the public in general and peace officers and firefighters in particular.[89] In an effort to deter the use of firearms, Chapters 136 and 142 create separate punishment classifications for the illegal use of firearms.[90] Additionally, Chapter 136 requires that a minimum sentence be imposed for firearm violations in order to receive a grant of probation or suspension of sentence.[91] Chapter 142 also requires the disposal of weapons illegally used[92] and authorizes peace officers to detain and search those individuals believed to have committed a violation of a law relating to firearms.[93] Finally, Chapter 1404 allows the taking of a minor unaccompanied by force for the purpose of sexual molestation to be prosecuted as a kidnapping.[94]

88. CAL. PENAL CODE §207(b).
89. *See* CAL. STATS. 1982, c. 136, §14, at —; Telephone conversation with Jim Rushford, Legislative Aide to Senator Davis, June 22, 1982 (notes on file at the *Pacific Law Journal*).
90. CAL. PENAL CODE §§245, 417.
91. *Id.* §§246, 417, 1203.095, 12021.1, 12025.
92. *Id.* §12028.
93. *Id.* §833.5.
94. *Id.* §207(b).

Criminal Procedure; mental capacity for specific intent

Penal Code §§21, 22, 28, 188 (amended).
SB 2035 (Roberti); STATS. 1982, Ch 1017
Support: Attorney General; California District Attorneys' Association; Joint Committee for Revision of the Penal Code
Opposition: State Public Defender

In 1981, legislation was enacted eliminating the defense of diminished capacity[1] and prohibiting evidence of mental disease[2] or volun-

1. *See* People v. Conley, 64 Cal. 2d 310, 319, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966); People v. Spaniel, 262 Cal. App. 2d 878, 886, 69 Cal. Rptr. 202, 207 (1968); CALIFORNIA JURY INSTRUCTIONS CRIMINAL CALJIC 8.79 (4th ed. 1979) (definition of diminished capacity).
2. *See In re* Ramon M., 22 Cal. 3d 419, 427-28, 584 P.2d 524, 530, 149 Cal. Rptr. 387, 393 (1978) (definition of mental disease).

tary intoxication[3] to show that the person accused of the crime did not have the ability to form the mental state necessary to commit that crime.[4] The legislation did, however, allow evidence of mental disease or voluntary intoxication to be used to show that the accused did not in fact form the required mental state for either general *or* specific intent crimes.[5]

In an apparent attempt to clarify this legislation,[6] Chapter 1017 limits the use of evidence of voluntary intoxication, mental disease, mental defect,[7] or mental disorder[8] by permitting the evidence to be admissible only to determine if the defendant formed the specific intent, premeditation, deliberation, or malice aforethought required for a specific intent crime.[9] Chapter 1017 does not limit the authority of a court to admit or exclude, pursuant to the rules of evidence, evidence of a mental disease, mental defect, or mental disorder of the defendant at the time of the alleged crime.[10]

Existing law provides that there will be no diminished capacity, diminished responsibility, or irresistible impulse defense allowed in criminal actions.[11] Chapter 1017 specifies that these defenses will also not be allowed in juvenile adjudication hearings.[12] Chapter 1017, however, provides that this provision is not applicable to persons not considered legally capable of committing a crime.[13]

Chapter 1017 revises the definition of malice necessary for the crime of murder.[14] Existing law states that an awareness of the obligation to

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3. CAL. PENAL CODE §22(c) (definition of voluntary intoxication).

4. *See* CAL. STATS. 1981, c. 404, §2, at — (amending CAL. PENAL CODE §22), CAL. STATS. 1981, c. 404, §4, at — (enacting CAL. PENAL CODE §28). *See generally* 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION, 651 (1982).

5. *See* CAL. STATS. 1981, c. 404, §§2, 4, at —.

6. *See* Telephone conversation with Ned Cohen, Consultant to the Joint Committee on Revision of the California Penal Code (September 9, 1982) (notes on file at the *Pacific Law Journal*).

7. 22 Cal. 3d at 427-28, 584 P.2d at 530, 149 Cal. Rptr. at 393 (definition of mental defect).

8. *See id.* (definition of mental disorder).

9. CAL. PENAL CODE §§22, 28. The restriction of the use of this evidence is necessary to correct an oversight that occurred in last year's legislation since the California Supreme Court has only allowed a diminished capacity defense to be used for crimes requiring specific intent. *See* People v. Foster, 19 Cal. App. 3d 649, 654, 97 Cal. Rptr. 94, 98 (1971); Telephone conversation, note 6 *supra*.

10. CAL. PENAL CODE §28(d).

11. *Id.* §28(b).

12. *Id.*

13. *Id.* §§21(b), 26 (persons considered incapable of committing crimes include children under the age of 14 in the absence of clear proof to the contrary; idiots; persons laboring under a mistake of fact that negates criminal intent; persons who are unconscious at the time of the commission of the allegedly criminal act; persons who commit the allegedly criminal act through misfortune or accident; and persons who are forced to commit a non-capital crime).

14. *Compare* CAL. PENAL CODE §188 *with* CAL. STATS. 1981, c. 404, §6, at —; CAL. PENAL CODE §188 *with id.* §7(4) (different statutory definitions of malice). *See generally* People v. Wayman, 1 Cal. App. 246, 248, 81 P. 1087 (1905) (the court states that the definition of malice in section 7(4) of the Penal Code is not of the type of malice necessary for the crime of murder).

act within the ordinary laws of society is not necessary for the element of malice.[15] Chapter 1017 provides that acting despite an awareness of the obligation to act within the general laws regulating society is included in the definition of malice.[16] Finally, the amendments made by Chapter 1017, excluding the provisions pertaining to the admission of evidence of mental disease, defect or disorder, are specified as declaratory of existing law.[17]

15. CAL. PENAL CODE §188; *see* People v. Conley, 64 Cal. 2d 310, 322, 411 P.2d 911, 924, 49 Cal. Rptr. 815, 828 (1966). The court required that "an awareness of the obligation to act within the general body of laws regulating society" exist within the person accused of murder before a finding of implied malice could be made from the circumstance of their act. *Id.*

16. CAL. PENAL CODE §188.

17. CAL. STATS. 1982, c. 1017, §5, at —. Proposition 8 purports to eliminate the defense of diminished capacity. To ensure that there will be no conflict between the two pieces of legislation, the Attorney General's office cooperated with Senator Roberti to write Chapter 1017 to complement Proposition 8. *See* Office of the Attorney General, California Department of Justice, Guide to Proposition 8, at 8-1 to 8-8 (June 1982) (copy on file at the *Pacific Law Journal*); Telephone conversation with Allen Arronberg, Legislative Unit, Attorney General's Office (September 20, 1982) (notes on file at the *Pacific Law Journal*).

Criminal Procedure; mental incompetency determination hearing

Penal Code §1368.1 (amended).
AB 3721 (Farr); STATS. 1982, Ch 444
Support: California Hospital Association; Pleasant Valley Hospital District; Office of Planning and Research

Existing law will not permit a defendant who is found mentally incompetent[1] to be tried in a court of law.[2] Existing law provides that if, during the pendency of an action and prior to final judgment, the defendant's mental capacity is at issue, the defense attorney may request a hearing or the court may, on its own motion, require a hearing to determine the defendant's mental state.[3] The hearing will, unless otherwise specified, suspend all other proceedings in the criminal prosecution.[4]

1. CAL. PENAL CODE §1367 (definition of mental incompetence); *see* People v. Campbell, 63 Cal. App. 3d 599, 608, 133 Cal. Rptr. 815, 819 (1976); 1 B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §509 (Supp. 1978) [hereinafter cited as WITKIN].

2. CAL. PENAL CODE §1367; *see* WITKIN, *supra* note 1, §508(a). "The conviction of an accused person while he is legally incompetent is a violation of due process. . . ." Pate v. Robinson, 383 U.S. 375, 378 (1966).

3. CAL. PENAL CODE §§1368(a), (b); WITKIN, *supra* note 1, §510(a). *See* CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PRACTICE §17.26 (Supp. 1980).

4. CAL. PENAL CODE §1368(c).

Prior to the enactment of Chapter 444, the information or indictment charging a felony had to be filed *before* the hearing to determine the defendant's mental competence.[5] This was a legislative attempt to cure previous provisions[6] that permitted the defendant to be committed without a determination that the defendant committed the charged crime simply because the defendant was incompetent to proceed to trial.[7]

Chapter 444, in an apparent attempt to avoid the duplicity of court hearings,[8] declares that if the action is on a complaint charging the felony, the proceedings to determine mental competence will be held *prior* to the filing of the information unless the defense counsel requests a preliminary hearing.[9] Under this statutory scheme, the court will avoid the previous procedure of two mandatory court hearings when the defendant's mental state has been put into issue since a determination that the defendant is mentally incompetent to be tried will relieve the court of the burden of a second hearing.[10]

Additionally, existing law provides that in an action on a complaint[11] charging a misdemeanor the defense attorney may (1) demur, (2) move to dismiss the complaint on the ground that there is not reasonable cause to believe that a public offense has been committed and that the defendant is guilty of that offense, or (3) make a motion to suppress evidence.[12] Chapter 444, to ensure that the person charged with the felony is afforded the opportunity to challenge the charges *before* the competency hearing, now allows the defendant's counsel, in a case when the complaint is charging a felony, to request a preliminary hearing to determine the sufficiency of the complaint.[13] At this preliminary hearing, defendant's counsel may (1) demur, (2) move to dismiss on the ground there is not reasonable cause to believe that a felony has been

5. CAL. STATS. 1974, c. 1511, §4, at 3317 (enacting CAL. PENAL CODE §1368.1).

6. *Id.*

7. WITKIN, *supra* note 1, §510; *see* Hale v. Superior Court, 15 Cal. 3d 221, 229, 124 Cal. Rptr. 57, 62, 539 P.2d 817, 822 (1975). *See generally* Jackson v. Indiana, 406 U.S. 715 (1972); *In re* Davis, 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973) (holding incompetency commitment procedures denied a defendant due process and equal protection of the laws); Chambers v. Municipal Court, 43 Cal. App. 3d 809, 118 Cal. Rptr. 120 (1974) (holding CAL. PENAL CODE §1368.1 constitutional); Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial*, 6 PAC. L.J. 484 (1975).

8. *See* Telephone conversation with Richard Iglehart, Deputy District Attorney for Alameda County, (August 9, 1982) (notes on file at the *Pacific Law Journal*).

9. CAL. PENAL CODE §1368.1(a).

10. *Id.; see* Telephone conversation, *supra* note 8.

11. CAL. PENAL CODE §806 (definition of complaint).

12. *Id.* §§1368.1(b), 1538.5 (motion to suppress evidence). *See* WITKIN, *supra* note 1, §510; 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 273 (1975).

13. CAL. PENAL CODE §1368.1(a).

committed and the defendant is guilty of that offense,[14] or (3) make a motion to suppress evidence.[15]

Prior law had mandated that in a misdemeanor complaint originating in a municipal or justice court, the court having jurisdiction over the complaint would hear any of these pretrial motions.[16] Chapter 444 now provides that in a case in which a complaint charges either a misdemeanor *or a felony*, the motions will be heard in the court having jurisdiction over the complaint.[17]

14. *Id.* §995.
15. *Id.* §§1368.1(a), 1538.5 (motion to suppress evidence).
16. CAL. STATS. 1974, c. 1511, §4, at 3317 (enacting CAL. PENAL CODE §1368.1).
17. *Compare id. with* CAL. PENAL CODE §1368.1(d). Existing law also provides that the court, when ruling on any motion in California Penal Code sections 1368.1(a) or (b), may hear any other matter capable of fair determination without personal participation of the defendant. *Id.* §1368.1(c). California Penal Code section 1368.1(d) also provides that the defendant will not be certified to the superior court for a mental incompetency hearing until all allowable motions have been heard. *Id.* §1368.1(d).

Criminal Procedure; requirement for public preliminary examination—exceptions

Government Code §6254 (amended); Penal Code §868.7 (new); §§867, 868 (amended).
AB 277 (Goggin); STATS. 1982, Ch 83
(*Effective March 1, 1982*)
Support: California Peace Officers Association
Opposition: City of Los Angeles; City of Oakland

Chapter 83 makes major changes in the procedures to be followed at preliminary examinations[1] and in the type of information to be disclosed under the California Public Records Act (hereinafter referred to as CPRA),[2] in order to alleviate confusion concerning public access to both criminal proceedings and nonsensitive law enforcement records.[3] Chapter 83 also mandates the exclusion of unexamined witnesses from a preliminary hearing if either party should so desire.[4] Furthermore, Chapter 83 orders previously exempted information to be disclosed

1. *Compare* CAL. PENAL CODE §§867, 868, and 868.7 *with* CAL. STATS. 1976, c. 1178, §§1, 2 at 5274 (amending CAL. PENAL CODE §§867, 868).
2. CAL. GOV'T. CODE §6251. *Compare* CAL. GOV'T. CODE §6254(f) *with* CAL. STATS. 1981, c. 684, §1.5, at 420 (amending CAL. GOV'T. CODE §6254). Additionally, Chapter 1594, effective September 30, 1982, exempts the records of the Medi-Cal special negotiator from disclosure. CAL. STATS. 1982, c. 1594, §2, at —.
3. *See* CAL. STATS. 1982, c. 83, §6, at —.
4. *See* CAL. PENAL CODE §867.

under the CPRA[5] and permits closing a preliminary examination to the press and public under additional conditions.[6]

Access to Public Records

Existing law provides that investigative and security records are expressly exempt from the right of every citizen to inspect public records.[7] Chapter 83 further exempts from disclosure information held by state and law enforcement agencies regarding the circumstances surrounding an arrest or complaint.[8] Chapter 83 specifically states, however, that this exemption will not apply to certain information concerning both the accused[9] and the victim[10] *unless* the release of information would endanger either the safety of persons involved in the investigation or jeopardize the successful completion of the investigation itself.[11] Furthermore, Chapter 83 states that nondisclosure of a person's address is permissible when the person was a victim of a sex crime or child or spousal abuse.[12] Chapter 83 provides these safeguards in addition to already existing protections in the CPRA[13] in apparent response to the concern expressed in case law that victims may be reluctant to report crimes if public disclosure is allowed.[14]

Exclusion of Witnesses

Existing law provides for motions to exclude witnesses from the courtroom[15] *and* to clear the courtroom entirely.[16] Under prior law, the magistrate[17] possessed discretionary authority to exclude witnesses.[18] Confusion often arose when an ambiguous motion was

5. *Compare* CAL. GOV'T CODE §6254(f) *with* CAL. STATS. 1981, c. 684, §1.5, at 420.
6. *See* CAL. PENAL CODE §§868, 868.7.
7. CAL. GOV'T. CODE §6254(f); *see id.* §6253.
8. *Compare id.* §6254(f)(1), (2) *with* CAL. STATS. 1981, c. 684, §1.5, at 420.
9. *See* CAL. GOV'T. CODE §6254(f)(1). This information includes the full name, current address, occupation, and date of birth of the individual arrested; the individual's physical description, the circumstances surrounding the arrest, the amount of bail set, the time and manner of release or where the individual is being held, and all charges upon which the individual is being held. *Id.*
10. *See id.* §6254(f)(2). This information includes the name, age, and address of the victim, and the circumstances of the crime or incident including a description of any injuries, property, or weapons involved. *Id.*
11. *See id.* §6254(f).
12. *Id.* §6254(f)(2).
13. *See id.* §6255. If the public interest served by nondisclosure clearly outweighs the interests served by disclosure, nondisclosure is permissible. *Id.*
14. *See* Black Panther Party v. Kehoe, 42 Cal. App. 3d 649, 653, 117 Cal. Rptr. 106, 110-11 (1974).
15. CAL. PENAL CODE §867.
16. *Id.* §868.
17. *Id.* §§807 (definition of magistrate), 808 (persons designated as magistrates).
18. *See* CAL. STATS. 1976, c. 1178, §1, at 5274 (amending CAL. PENAL CODE §867).

made.[19] Chapter 83 relieves this problem by *requiring* that all witnesses be excluded from the hearing on a motion from either party.[20] Moreover, Chapter 83 attempts to preserve the integrity of testimony taken in a preliminary examination by requiring the magistrate to prevent the witnesses from conversing with one another.[21]

Closing of Preliminary Examinations

Chapter 83 states that preliminary examinations are to be open and public.[22] If, however, the defendant requests that the courtroom be cleared and the magistrate finds that exclusion is necessary to protect the defendant's right to a fair trial, the magistrate must exclude everyone from the courtroom except those specified.[23]

Chapter 83 further adds that the hearing may be closed on the prosecutor's motion during a witness' testimony if the witness is a minor and a victim of a sex offense[24] or if the witness' life is jeopardized by public testimony.[25] This closing, however, may occur only if no alternative procedures[26] are available to protect the witness.[27] If the hearing is ordered closed, a transcript of the hearing is to be made public as soon as practicable.[28]

Comment

Several important issues are raised by the enactment of Chapter 83. Specifically, the extent of the right of a defendant to a public hearing is called into question.

Chapter 83 provides that the preliminary hearing may be closed in

19. *See generally* People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); People v. Bookout, 197 Cal. App. 2d 457, 17 Cal. Rptr. 213 (1961); People v. Malloy, 199 Cal. App. 2d 219, 18 Cal. Rptr. 545 (1962); People v. Gentemann, 201 Cal. App. 2d 711, 20 Cal. Rptr. 435 (1962) (all cases discuss whether a motion made was to exclude only witnesses and therefore discretionary, or to clear the courtroom entirely and thus mandatory).

20. CAL. PENAL CODE §867.

21. *See id.*

22. *See id.* §868.

23. *Id.* The following will not be excluded from a preliminary examination: the magistrate's clerk, the court reporter, the bailiff, the prosecutor, the prosecutor's counsel, the Attorney General, the county district attorney, the investigating officer, the officer in custody of a prisoner witness while the prisoner testifies, the defendant, the defendant's counsel, the officer having custody of the defendant, and a support person chosen by the prosecuting witness. *Id.*

24. *See id.* §868.7(a)(1).

25. *See id.* §868.7(a)(2).

26. *See id.* §868.7. Alternative procedures include, but are not limited to, videotaped depositions, closed circuit examinations, concealment of physical features, searching the public, and the temporary exclusion of witnesses. *Id. See generally* 14 PAC. L.J., REVIEW OF SELECTED CALIFORNIA 1982 LEGISLATION (1983).

27. *See* CAL. PENAL CODE §868.7(a)(1), (2).

28. *See id.* §868.7(b).

specified circumstances on the motion of the prosecutor.[29] In *Globe Newspaper Co. v. Superior Court*,[30] the United States Supreme Court rejected as unconstitutional a Massachusetts law *requiring* a closed trial where the victim of a sex crime was under eighteen.[31] Since the California provision is discretionary[32] and relates to preliminary examinations rather than to the trial itself,[33] the constitutional issues presented in *Globe* do not appear to arise.

Another possible constitutional issue still remains, however, in light of the California Supreme Court decision in *People v. Pompa-Ortiz*.[34] In that case the court found that defendants have a right to a public preliminary hearing,[35] with the majority finding a basis in legislative intent,[36] and Chief Justice Bird finding an unspecified constitutional right in her concurring opinion.[37] While Chapter 83 clarifies legislative intent by permitting closure of a preliminary hearing in specified circumstances,[38] the question of whether the constitutional right to an open trial also attaches to the preliminary hearing is still unanswered.[39]

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29. *See id.* §868.7. The hearing may be closed if the witness is a minor, the victim of a sex offense and serious psychological harm would be threatened by testifying in public, or if a witness' life would be subject to substantial risk by appearing in public. *Id.*
30. 102 S. Ct. 2613 (1982).
31. *See id.* at 2622.
32. *See* CAL. PENAL CODE §868.7(a).
33. *See id.*
34. 27 Cal. 3d 519, 612 P.2d 941, 165 Cal. Rptr. 851 (1980).
35. *See id.* at 526, 612 P.2d at 945, 165 Cal. Rptr. at 855.
36. *See id.* at 524-26, 612 P.2d at 943-45, 165 Cal. Rptr. at 853-55.
37. *See id.* at 531, 612 P.2d at 948, 165 Cal. Rptr. at 858.
38. *See* CAL. PENAL CODE §868.7(a).
39. *See* Gannet Co. v. DePasquale, 443 U.S. 368, 394-5 (Burger, C.J., concurring), 434, 437 (Blackmun, J., concurring in part and dissenting in part) (1979); San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 510-11, 638 P.2d 655, 662-63, 179 Cal. Rptr. 772, 779-80 (1982); Borow and Kurth, *Closed Preliminary Hearings: The Constitutionality of Penal Code Section 868 in the Aftermath of Gannett v. DePasquale*, 55 CAL. ST. B.J. 18, 20 (1980); Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. L. REV. 397, 412-13 (1961) (comparison of preliminary examinations and suppression hearings with trials).

Criminal Procedure; arraignments

Penal Code §976 (amended).
AB 2768 (Robinson); STATS. 1982, Ch 395
Support: Judicial Council; Orange County
Opposition: Orange County Chiefs of Police and Sheriffs Association

Under existing law, unless an exception applies, a defendant must be

arraigned[1] before the same court in which the accusatory pleading is filed.[2] An exception, under previous law, was specifically provided for defendants in custody within Los Angeles and San Diego counties[3] who were to be charged with a misdemeanor[4] and arraigned in municipal court.[5] These defendants were allowed to be arraigned before the municipal court within the county closest to the place where they were held in custody upon approval of both the presiding judge of the nearest municipal court and the presiding judge of the filing court.[6] In addition, the accused was allowed to make three completed telephone calls prior to being taken away from the place of custody.[7]

Chapter 395 expands this exception by giving both felony and misdemeanor[8] defendants in custody in any county in California the right to be arraigned before the court closest to the criminal defendant's place of custody if it is within the same county and if both the presiding judge of the nearest court and the presiding judge of the filing court approve of the change.[9]

1. *See* CAL. PENAL CODE §988 (definition of arraignment); *see also* 63 OP. ATT'Y GEN. 193-95 (1980).
2. CAL. PENAL CODE §976(a).
3. CAL. STATS. 1979, c. 735, §2 at 2572; CAL. GOV'T CODE §§28020-28024.
4. Municipal courts have jurisdiction in all criminal misdemeanor cases. CAL. PENAL CODE §1462; *see also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §35 (1963). Superior courts have exclusive jurisdiction over felony cases but have no jurisdiction over cases charging only misdemeanors in counties with either justice or municipal courts. *See* CAL. CONST. art. VI, §10; CAL. PENAL CODE §1462; *see also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §31 (Supp. 1973).
5. CAL. STATS. 1979, c. 735, §2, at 2572.
6. *Id.*
7. *Id.*
8. *See* note 4, *supra*.
9. *Compare* CAL. PENAL CODE §976(a) with CAL. STATS. 1979, c. 735, §2, at 2572.

Criminal Procedure; scheduling of parole hearings

Penal Code §§3041.5, 3042 (amended).
AB 2832 (La Follette); STATS. 1982, Ch 1435
Support: Board of Prison Terms; Department Of Finance

Under existing law, the Board of Prison Terms determines a prisoner's eligibility for parole.[1] When prisoners are denied a parole date, their cases must be heard annually thereafter until parole is granted, subject to statutory exceptions.[2] Chapter 1435 expands on the allowable exceptions to the annual meeting requirement for certain

1. *See* CAL. PENAL CODE §3040 (gives the Board of Prison Terms power to grant parole).
2. *Id.* §3041.5(b)(2).

prisoners.[3]

Existing law permits a subsequent parole hearing to be scheduled no later than three years after the hearing when parole was denied for prisoners convicted of more than one offense that involved the taking of a life.[4] Chapter 1435 retains this provision, and additionally permits the Board to schedule the subsequent parole hearing within two years after the hearing when parole is denied for *any* prisoner if the Board determines that it is not reasonable to expect that parole would be granted at a hearing during the following year.[5]

3. *Compare id. with* CAL. STATS. 1981, c. 1111, §4, at — (amending CAL. PENAL CODE §3041.5).
4. *See* CAL. STATS. 1981, c. 1111, §4, at —.
5. *See* CAL. PENAL CODE §3041.5(b)(2). *Compare id. with* CAL. STATS. 1981, c. 1111, §4, at —.

Criminal Procedure; dismissal of criminal cases

Penal Code §1382 (amended).
AB 3421 (Farr); STATS. 1982, Ch 433
Support: Attorney General

In order to ensure a speedy trial,[1] existing law provides that, unless good cause to the contrary is shown, the superior court must dismiss a criminal action if the defendant is not brought to trial within 60 days.[2] If a delay is due to a request by the defendant, or if the defendant consents[3] to the delay or fails to appear, an additional 10 day period for bringing the defendant to trial is imposed before a dismissal can be granted.[4]

When a defendant failed to appear for a trial date and later returned or was recaptured, a possible interpretation of prior law gave the prosecutor only 10 days to bring the defendant to trial.[5] To ease this time constraint,[6] Chapter 433 expressly extends the period to prosecute by providing that if a defendant fails to appear after having requested a trial date beyond the 60 day period and a bench warrant has been is-

1. *See* Sanchez v. Municipal Court, 97 Cal. App. 3d 806, 810, 159 Cal. Rptr. 91, 92 (1979); U.S. CONST. amend. VI, §1; CAL. CONST. art. I, §13.
2. CAL. PENAL CODE §1382(2).
3. *Id.* (consent may be express or implied).
4. *Id.*
5. Telephone conversation with Richard Igelhart, Chief Assistant District Attorney, Alameda County, (August 17, 1982) (notes on file at the *Pacific Law Journal*). *See generally* CAL. STATS. 1973, c. 847, §1, at 1513 (amending CAL PENAL CODE §1382).
6. Telephone conversation, *supra* note 5.

sued for that person's arrest for nonappearance, the defendant can still be brought to trial within 60 days of the next appearance in superior court.[7] Chapter 433 also prohibits the superior court from granting a defendant's motion to set an earlier trial date if the defendant had requested an original date beyond the 60 day period, unless the court finds good cause for granting the motion and all parties receive proper notice.[8]

7. CAL. PENAL CODE §1382(2).
8. *Id.*

Criminal Procedure; prosecutorial discovery rights

Penal Code §1102.5 (new); §1051 (amended).
SB 1808 (Maddy); STATS. 1982, Ch 1249
Support: Attorney General; California District Attorneys' Association; Department of Finance

Under prior law, a prosecutor had good cause for a continuance if a witness other than the defendant testified as to an alibi defense, unless the prosecutor was or should have been aware of this evidence.[1] Chapter 1249 limits the availability of this continuance to instances when the witness is a *defense* witness, other than the defendant, and provides that a reasonable continuance will be available for *any* testimony, unless the prosecutor was or should have been aware of the evidence.[2]

Chapter 1249 states that upon making a motion, the prosecution can obtain from the defense all statements[3] made by a defense witness, *other than the defendant*,[4] after the witness has completed testifying on direct examination.[5] In addition, Chapter 1249 provides that upon request of the defense the court is required to review the statement *in camera* and limit discovery to those matters within the scope of the direct testimony of the witness.[6] Furthermore, Chapter 1249 requires

1. CAL. STATS. 1980, c. 551, §1, at 1534 (enacting CAL. PENAL CODE §1051).
2. CAL. PENAL CODE §1051.
3. *Id.* §1102.5(a) (statements can be oral or however preserved). The statements include factual summaries but do not include the impressions, conclusions, opinions, or legal research or theories of the defendant, the defendant's counsel or agent. *See* People v. Collie, 30 Cal. 3d 43, 59, 634 P.2d 534, 543, 177 Cal. Rptr. 458, 467 (1981) (work product is privileged in criminal trials).
4. This is an apparent attempt to satisfy constitutional requirements against self-incrimination. *See* Senator Ken Maddy, Press Release, August 26, 1982 (copy on file at the *Pacific Law Journal*).
5. *See* CAL. PENAL CODE §1102.5(a).
6. *Id.*

the prosecution to make available to the defense all evidence[7] obtained or prepared as a consequence of obtaining discovery information through this provision.[8]

COMMENT

The provision in Chapter 1249 that permits the prosecution to discover from the defendant or the defendant's attorney, statements of witnesses other than the defendant after they testify, may be subject to constitutional challenge since this provision may violate the defendant's right against self-incrimination, which is guaranteed in the California Constitution.[9] Although the purpose of discovery is to ascertain the truth,[10] the task of creating prosecutorial discovery rights that allow for effective prosecution without violating the constitutional privilege against self-incrimination has been a struggle of the courts for at least 20 years.[11]

The California Supreme Court in *Prudhomme v. Superior Court*[12] held that any evidence that conceivably might lighten the prosecutor's burden of proving its case in chief would not be discoverable.[13] Some case law held that prior statements of a defense witness for purposes of impeachment were discoverable from the defendant or the defendant's attorney.[14] Alternatively, another case held that even statements that impeach a defense witness without otherwise inculpating the defendant

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7. This includes the names, addresses and statements of witnesses. *Id.* §1102.5(b).

8. *Id.*

9. *See* CAL. CONST. art. I, §15. Another constitutional right that is threatened is the right to assistance of counsel. *See* 30 Cal. 3d at 55, 634 P.2d at 540, 177 Cal. Rptr. at 464. "A defense counsel's ability to freely investigate and effectively present the defense could be seriously compromised. A rule that would open the defense files if a witness or the defendant testified could penalize the defendant whose attorney was most vigilant in gathering, documenting, recording and studiously analyzing evidence to prepare the defense." Prosecutorial discovery also risks conflict with the attorney-client privilege. *Id.*

10. *See* Jones v. Superior Court, 58 Cal. 2d 56, 58, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (1962).

11. *See generally id.* at 56, 372 P.2d at 919, 22 Cal. Rptr. at 879.

12. 2 Cal. 3d 320, 466 P. 2d 673, 85 Cal. Rptr. 129 (1970).

13. *See id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133; 30 Cal. 3d at 50, 634 P.2d at 537, 177 Cal. Rptr. at 461. Furthermore, the test forbids compelled disclosures which could serve as a link in a chain of evidence tending to establish guilt of a criminal offense. 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133; 30 Cal. 3d at 50, 634 P.2d at 537, 177 Cal. Rptr. at 461.

14. *See* 30 Cal. 3d at 52-53, 634 P.2d at 538-39, 177 Cal. Rptr. at 463. *See generally* People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975) (the justification for the holding was that the privilege was personal to defendant and did not apply to third party statements); People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973) (the holding was justified by the fact that the witness had already testified when discovery was requested, and thereby opened the door to discovery within the scope of the testimony); People v. Bais, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973) (holding justified on fact that statements which merely impeach a defense witness do not incriminate the defendant because they do not assist in proving the prosecution's case in chief).

were protected and not discoverable.[15]

The California Supreme Court, in *People v. Collie*,[16] recently held that prosecutorial discovery was not permissible absent explicit legislative authorization, and did not rule on the constitutional issue.[17] Thus, the constitutionality of prosecutorial discovery is still an open question.

15. *See* People v. Thornton, 88 Cal. App. 3d 795, 802, 152 Cal. Rptr. 77, 81 (1979); 30 Cal. 3d at 53, 634 P.2d at 539, 177 Cal. Rptr. at 463.
16. 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981).
17. *Id.* at 53-54, 634 P.2d at 539-40, 177 Cal. Rptr. at 463-64.

Criminal Procedure; motion for suppression of evidence

Penal Code §1538.5 (amended).
SB 1744 (Holmdahl); STATS. 1982, Ch 625
(Effective August 27, 1982)
Support: California District Attorneys' Association

Under existing law, evidence gathered as a result of an unlawful[1] search and seizure[2] may be excluded by a motion to suppress evidence.[3] If the defendants intend to make a motion for the exclusion of evidence or the return of seized property,[4] they must comply with specific procedural provisions.[5] Existing law permits all search and seizure motions in felony cases to be litigated in the municipal court at the preliminary hearing and *de novo* at a special hearing in the superior court.[6] Prior to the enactment of Chapter 625, these provisions had allowed the defense, at the preliminary hearing stage, to make search and seizure motions to *any* evidence of the prosecution regardless of whether the evidence had been introduced by the prosecution.[7] In effect, any litigation of evidence not expressly introduced at the preliminary hearing stage lead to redundant litigation since the *de novo* litigation in the superior court could occur regardless of the ruling at

1. CAL. PENAL CODE §1538.5(a) (providing that the search or seizure is unlawful if (1) the warrant is insufficient on its face, (2) the property or evidence obtained is not that described in the warrant, (3) there was not probable cause for the issuance of the warrant, (4) the method of execution of the warrant violated federal or state constitutional standards, (5) there was any other violation of federal or state constitutional standards, or (6) the search or seizure without a warrant was unreasonable).
2. *See generally* CAL. CONST., art. I, §13.
3. CAL. PENAL CODE §1538.5(a).
4. *Id.* §1538.5(e).
5. *See id.* §1538.5.
6. *Id.* §1538.5(i).
7. CAL. STATS. 1977, c. 137, §1, at 573 (amending CAL. PENAL CODE §1538.5).

the preliminary stage.[8] Chapter 625, in an apparent attempt to avoid duplications of court determinations, and make these provisions more uniform and economical,[9] now requires that when the defendant opts to make a suppression motion at the preliminary hearing, the motion must be limited to *only* that evidence that the prosecution seeks to introduce at this initial stage.[10]

Existing law also provides that if the property or evidence relates to a felony initiated by complaint and the defense attorney's motion to suppress evidence is granted at the preliminary hearing, the prosecution may file a new complaint or seek an appellate writ.[11] Moreover, recent amendments to the provision relating to appealable decisions by the state[12] allow the prosecution to seek a motion in superior court to reinstate the complaint if it is dismissed at the preliminary hearing stage by a magistrate.[13] Some confusion, however, existed as to whether these recent amendments applied to superior court decisions of the dismissal of complaints due to successful search and seizure motions.[14] In *Vlick v. Superior Court*,[15] a California Court of Appeals held that the Legislature intended the enactment to include appellate review of search and seizure determinations by a municipal court judge.[16] Chapter 625 codifies this interpretation by expressly stating that the prosecution could, in addition to other options,[17] seek a motion to reinstate the complaint in the superior court after a successful suppression motion at the preliminary hearing.[18] Finally, Chapter 625 states that the intent of the Legislature is that these provisions do not create any new grounds for the exclusion of evidence[19] and are purposefully intended to be procedural changes only.[20]

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8. *See id.*
9. CAL. STATS. 1982, c. 625, §3, at — (amending CAL. PENAL CODE §1538.5).
10. CAL. PENAL CODE §1538.5(f).
11. *Id.* §1538.5(j).
12. *See id.* §1238.
13. *Id.* §1238(a)(9).
14. *See* Vlick v. Superior Court, 128 Cal. App. 3d 992, 996, 180 Cal. Rptr. 742, 746 (1982).
15. *Id.*
16. *Id.* at 998, 180 Cal. Rptr. at 746.
17. See CAL. PENAL CODE §1538.5(j) (the people may file a new complaint or seek an indictment after the preliminary hearing).
18. *Id.*
19. CAL. STATS. 1982, c. 625, §2, at — (amending CAL. PENAL CODE §1538.5).
20. *Id.*

Criminal Procedure; testimony of victim

Penal Code §1346 (new).
AB 79 (Mountjoy); STATS. 1982, Ch 98
Support: California Peace Officers Association; California State Juvenile Officers Association; Parent Teacher Association
Opposition: California Judges Association; State Public Defender

Under existing law, when a witness in a criminal trial will be unavailable[1] at the time of the trial, the witness may be conditionally examined[2] prior to trial provided the rights to confrontation and cross-examination are preserved.[3] This prior testimony is admissible as evidence in lieu of the appearance of the witness at the subsequent trial.[4] Chapter 98 creates an additional circumstance when prior testimony can be admitted at a criminal trial.[5]

The enactment of Chapter 98 protects selected victims from the emotional trauma of testifying at the trial.[6] When the victim is 15 years of age or younger and the victim of certain sex crimes,[7] the prosecution may apply for an order to record the victim's testimony at a preliminary hearing[8] using either a written or videotaped transcript.[9] To obtain this order, the prosecution must make a written application three days prior to the preliminary hearing.[10] If the application is timely, the magistrate must order the victim's testimony to be taken at the hearing and the transcript to be sent to the clerk of the court where the action is pending.[11]

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1. CAL. EVID. CODE §240 (definition of unavailable witness); *see id.* §1291 (use of former testimony by an unavailable witness at trial).
2. *See generally* CAL. PENAL CODE §1335-1346.
3. *See* California v. Green, 399 U.S. 149, 165-68 (1969); CAL. PENAL CODE §1340. *See generally* Barker & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017, 1030-36 (1974) (discussing the impact of the use of videotape in depositions on the right to confrontation).
4. *See* CAL. EVID. CODE §1291.
5. *See* CAL. PENAL CODE §1346.
6. *See* Assemblyman Dick Mountjoy, Press Release, April 4, 1981 (copy on file at the *Pacific Law Journal*).
7. CAL. PENAL CODE §1346(a) (specified crimes include rape; unlawful intercourse with a female under 18 years of age; aiding and abetting rape; incest; sodomy; lewd or lascivious acts on a child; oral copulation; penetration of genital or anal opening with a foreign object).
8. *See* People v. Ware, 78 Cal. App. 3d 822, 828, 144 Cal. Rptr. 354, 357 (1978) (preliminary hearing considered a conditional examination of a witness).
9. *See* CAL. PENAL CODE §1346(a). *See generally* Barker & Bates, *Videotape in Criminal Procedure*, 25 HASTINGS L.J. 1017-40 (1974).
10. *See* CAL. PENAL CODE §1346(b).
11. *See id.* §1346(c).

Furthermore, Chapter 98 requires the trial court to find that testifying at the trial would cause the victim emotional trauma so that the victim is medically unavailable,[12] or that the victim is otherwise unavailable to testify due to physical illness or mental illness at the time of the trial,[13] before a transcript of the testimony can be admitted as evidence.[14] Once a finding is made, the videotape or written transcript may be admitted as evidence at the trial and the victim need not appear.[15]

12. *See id.* §1346(d).
13. *See* CAL. EVID. CODE §240(a)(3). *See generally* People v. Herrera, 26 Cal. App. 3d 764, 179 Cal. Rptr. 110 (1981); People v. Gomez, 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (1972) (providing guidelines for determining what constitutes unavailability of witnesses).
14. *See* CAL. PENAL CODE §1346(d).
15. *See id.*

Criminal Procedure; material witnesses

Penal Code §881 (amended).
AB 1421 (Leonard); STATS. 1982, Ch 56
Support: California District Attorneys Association; California Peace Officers Association

Existing law provides that a subpoena[1] may be issued to compel the attendance of a witness at a preliminary hearing.[2] Chapter 56 establishes procedures and penalties that apply when a witness fails to respond to the subpoena.[3]

Under Chapter 56, if a person who failed to respond to the subpoena is determined at an evidentiary hearing to be a material witness,[4] the court will issue a bench warrant[5] for the person's arrest.[6] After arrest and upon appearance at the preliminary hearing, the witness may be committed to custody until the conclusion of the preliminary hearing[7] or ordered to enter into a written undertaking,[8] promising to appear

1. CAL. PENAL CODE §1326 (definition of subpoena).
2. *See id.*
3. *Id.* §881(b), (c), (d), (e).
4. *See generally* People v. Rhone, 267 Cal. App. 2d 652, 73 Cal. Rptr. 463 (1968) (a subpoena may be quashed when the witness would not have contributed material evidence).
5. *See* CAL. PENAL CODE §§979-986 (procedural requirements relating to bench warrants).
6. *Id.* §881(b).
7. *Id.* (the witness will also be released if the defendant pleads *nolo contendre* or is legally discharged).
8. *See generally id.* §1278 (undertaking format).

and testify at the time and place designated by the court.[9] Witnesses who fail to obey the order will be imprisoned by the magistrate[10] until they comply or are legally discharged.[11]

Even though under existing law, the officer who makes an arrest pursuant to a bench warrant is directed to deliver the arrestee before the court,[12] and presumably the same procedure will be followed when a material witness is arrested for failure to appear,[13] there may be situations when the witness cannot be delivered directly to the preliminary hearing.[14] In response to that situation, Chapter 56 states that the witness must be brought before the magistrate who issued the warrant, if available, within two days after being taken into custody.[15] The magistrate will then decide whether the witness should be released on security of appearance[16] or maintained in custody.[17] Chapter 56 guarantees that whether the witness is brought directly before the court or is given a hearing before a magistrate, a material witness will not be maintained in custody without some form of judicial determination.[18] Additionally, Chapter 56 provides that a material witness may not remain in custody for more than 10 days.[19]

In an apparent attempt to reconcile the competing interests of the defendant,[20] the material witness,[21] and the prosecution,[22] Chapter 56 states that once the witness is remanded to custody, the prosecution is entitled to have the preliminary hearing proceed, as to the witness only, within 10 days of the defendant's arraignment.[23] The defendant is enti-

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9. *Id.* §881(b) (failure to fulfill the undertaking will result in a forfeiture of an amount the court deems proper).

10. *See id.* §807 (definition of magistrate). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Introduction* §16 (1963) (discussion of magistrates and their functions).

11. CAL. PENAL CODE §881(a).

12. *See id.* §1199.

13. *See id.* §881(b) (the disposition of the witness is to be determined upon the witness' appearance before the court).

14. *See generally id.* §861 (preliminary examinations may be postponed, on a showing of good cause, up to 10 days and under specified circumstances up to 60 days).

15. *Id.* §881(c).

16. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Proceedings Before Trial* §146 (1963) (discussion of security of appearance).

17. CAL. PENAL CODE §881(c).

18. *See id.* §881(b), (c).

19. *Id.* §881(d).

20. *See id.* §1050 (the defendant is entitled to an expeditious disposition of the criminal proceedings).

21. *See* CAL. CONST. art. I, §10 (a witness may not be unreasonably detained). *See generally In re* Jesus B., 75 Cal. App. 3d 444, 142 Cal. Rptr. 197 (1977) (suggesting constitutional restrictions on the length of time a witness may be detained).

22. The prosecution will want to present the material witness' testimony before the expiration of the ten day limitation. *See* CAL. PENAL CODE §881(d).

23. *Id.* §881(e).

tled to a reasonable continuance[24] after the witness finishes testifying.[25]

24. *See generally id.* §1050 (procedural requirements for obtaining a continuance).
25. *Id.* §881(e).

Criminal Procedure; pretrial diversion program

Penal Code §§1001.50, 1001.51, 1001.52, 1001.53, 1001.54, 1001.55 (new).
AB 2072 (Levine); STATS. 1982, Ch 1251
Support: California Attorneys for Criminal Justice; Chief Probation Officers of California; Department of Motor Vehicles

In order to conserve scarce criminal justice resources and promote the rehabilitation of defendants,[1] Chapter 1251 authorizes and establishes procedures for a pretrial diversion[2] program at the county level to become operative if adopted by the county board of supervisors[3] and approved and annually reviewed by the county's district attorney.[4] Under this program, prosecution of criminal charges against a defendant are postponed while the defendant enters an educational, treatment, or rehabilitative program.[5]

Chapter 1251 provides that a defendant charged with a specified misdemeanor,[6] can be eligible for this program.[7] Diversion, however, will not be permitted if the defendant (1) has previously been convicted of a felony,[8] (2) did not complete probation or parole,[9] (3) has been convicted of a misdemeanor in the past five years,[10] or (4) has been through a county pretrial diversion program in the past five years.[11] Furthermore, diversion is not allowed for an individual charged with

1. CAL. STATS. 1982, c. 1251, §1, at — (enacting CAL. PENAL CODE §§1001.50-1001.55). *See* Note, *Pretrial Diversion: Problems of Due Process and Weak Cases*, 59 B.U.L. REV. 305, 306-08 (1979).
2. CAL. PENAL CODE §1001.50(c) (pretrial diversion means the temporary or permanent postponing of prosecution at any point in the judicial process from the time the defendant is charged until adjudication).
3. *Id.* §1001.50(a).
4. *Id.* §1001.50(b).
5. *See id.* §1001.52(a).
6. *Id.* §1001.51(c). A defendant is ineligible for the program if charged with (1) a misdemeanor for which incarceration is required, registration as a sex offender is required, or probation is not permitted; (2) a misdemeanor that is a violation of the Vehicle Code or one in which force or violence is used (other than assault or battery); or (3) a misdemeanor which the magistrate determines shall be prosecuted as a misdemeanor. *Id.*
7. *Id.* §1001.51(a). *See generally An Analysis of State Pretrial Diversion Statutes*, 15 COLUM. J.L. & SOC. PROBS. 1, 20-31 (1979) (comparison of states' criteria for admission to pretrial diversion programs).
8. CAL. PENAL CODE §1001.51(a)(3).
9. *Id.* §1001.51(a)(1).
10. *Id.* §1001.51(a)(3).
11. *Id.* §1001.51(a)(2).

driving under the influence of alcohol or drugs.[12]

If the defendant consents and waives the right to a speedy trial,[13] the probation department must determine if the defendant qualifies for a pretrial diversion program and the educational, treatment, or rehabilitative program that would be beneficial to the defendant.[14] If the department's recommendation for referral is to a community program, the report to the court must indicate the willingness of the program to accept the defendant and the manner in which the services of the program will aid the defendant.[15] Chapter 1251 also provides that information uncovered in the probation department's investigation or brought to the department's attention subsequent to the granting of diversion cannot be used in further proceedings.[16] Additionally, this information cannot be used in pretrial sentencing procedures in the event diversion is denied or revoked.[17]

Upon receiving the department's recommendation, the court must hold a hearing to determine if the defendant should be placed in the diversion program.[18] If diversion is ordered, the defendant's bail is exonerated.[19] The court, however, may also order the defendant to pay all or part of the reasonable costs of the program if the defendant is able to pay.[20] In no event is the prescribed program to exceed two years in length.[21] Should the court determine that pretrial diversion is not warranted, the proceedings will continue as in any other case.[22]

Chapter 1251 also provides that the court will hold a hearing and reinstate criminal proceedings if the court finds that the defendant (1) fails to perform satisfactorily in the diversion program, (2) is not benefiting from the education, treatment or rehabilitation, or (3) is subsequently convicted of a felony or of a misdemeanor using force or violence.[23] If the defendant successfully completes the pretrial diversion program, all criminal charges against the defendant will be dis-

12. *Id.* §1001.51(b).
13. *See generally* Note, *supra* note 1, at 322-332 (discussion of the misuse of diversion in weak cases, particularly the pressures on innocent parties to accept diversion and thereby minimize their risks, due to the expense and time involved in discovery procedures).
14. CAL. PENAL CODE §1001.52(a).
15. *Id.*
16. *Id.* §1001.52(b).
17. *Id.*
18. *Id.* §1001.53.
19. *Id.*
20. *Id.* (the reasonable cost of diversion will not exceed the actual average cost of diversion services).
21. *Id.*
22. *Id.*
23. *Id.* §1001.54. *See generally* Note, *supra* note 1, at 311-322 (by assuring the defendant of a court hearing on the potential revocation, the defendant's due process rights are protected).

missed[24] and the record of the arrest will be expunged.[25]

24. CAL. PENAL CODE §1001.54.
25. *Id.* §1001.55.

Criminal Procedure; payment of restitution

Health & Safety Code §8101 (amended); Penal Code §§1202.5 (repealed); 1203.04 (new); 243.5, 594, 1203.1 (amended); Welfare & Institutions Code §729.6 (new).
SB 2060 (Boatwright); STATS. 1982, Ch 1413
Support: Attorney General; California Peace Officers Association; Department of Finance; Los Angeles County District Attorney

The requirement of restitution[1] by criminals to their victims as a condition of probation has been viewed as a rehabilitative tool since it makes a criminal aware of the harm done to a particular individual.[2] Under prior law, it was within the discretion of a court to order restitution as a condition of probation for most crimes[3] except in cases in which restitution was a mandatory condition of probation.[4] Chapter 1413 now *requires* that restitution be made a condition of probation upon the conviction of *any* crime,[5] unless the court finds restitution is inappropriate.[6] In the event restitution is deemed inappropriate, the court has the alternative of requiring community service, unless it too, is found to be inappropriate.[7] The reasons for a determination of the inappropriateness of either restitution or community service must be

1. "Restitution" is the payment to the injured party for the value of stolen or damaged property (repair or replacement value), medical expenses and lost wages or profits when these losses were caused by the convicted defendant as a result of committing a crime. CAL. PENAL CODE §1203.04(b)(3). Comparative negligence is not relevant in determining restitution, nor are compensated damages actionable in a later civil suit. *Id. See generally* RESTITUTION IN CRIMINAL JUSTICE (Hudson & Galaway eds. 1977) (papers presented at the 1975 First International Symposium on Restitution).
2. *See* People v. Richards, 17 Cal. 3d 614, 620, 552 P.2d 97, 100-101, 131 Cal. Rptr. 537, 540-41 (1976); Galaway, *Toward the Rational Development of Restitution*, RESTITUTION IN CRIMINAL JUSTICE 77, 83 (1977).
3. CAL. STATS. 1981, c. 727, §1, at 772 (amending CAL. PENAL CODE §1203.1).
4. *See generally* CAL. STATS. 1981, c. 211, §1, at 587 (amending CAL. HEALTH & SAFETY CODE §8101); CAL. STATS. 1981, c. 566, §1, at 89 (enacting CAL. PENAL CODE §243.5); CAL. STATS. 1979, c. 200, §1, at 445 (amending CAL. PENAL CODE §594); CAL. STATS. 1978, c. 1189, §1, at 3840 (enacting CAL. PENAL CODE §1202.5).
5. CAL. PENAL CODE §§1203.04(a), 1203.1. Additionally, CAL. STATS. 1982, c. 1414, §1.5, at — (amending CAL. PENAL CODE §1203.1) requires that restitution payments received by the probation department be forwarded to the crime victim within a specified time period.
6. *See* CAL. PENAL CODE §1203.04(a). Restitution is appropriate whenever the crime involves a victim. *Id.* §1203.04(b)(1).
7. *Id.* §1203.04(a).

stated in the record.[8]

Since restitution is now required as a condition of probation for those convicted of *any* crime,[9] Chapter 1413 repeals the specific provisions that required restitution only for certain crimes.[10] Additionally, Chapter 1413 permits the court to order *both* restitution and the performance of community service as a condition to probation.[11] Finally, Chapter 1413 adds identical provisions for the imposition of restitution, community service, or both restitution and community service as a condition of probation for juveniles charged with crimes and who remain in the custody of their parents.[12]

8. *Id.*
9. *Id.* §§1203.04(a), (b)(1), 1203.1.
10. *Compare* CAL. HEALTH & SAFETY CODE §8101 *and* CAL. PENAL CODE §§243.5, 594, 1202.5 *with* CAL. STATS. 1981, c. 211, §1, at 587 (amending CAL. HEALTH & SAFETY CODE §8101), CAL. STATS. 1981, c. 566, §1, at 89 (enacting CAL. PENAL CODE §243.5), CAL. STATS. 1979, c. 200, §1, at 445 (amending CAL. PENAL CODE §594), *and* CAL. STATS. 1978, c. 1189, §1, at 3840 (enacting CAL. PENAL CODE §1202.5).
11. CAL. PENAL CODE §1203.04(b)(2).
12. CAL. WELF. & INST. CODE §729.6.

Criminal Procedure; misdemeanor arrests, juveniles

Education Code §48922 (amended); Penal Code §853.6 (amended); Welfare & Institutions Code §653.1 (new); §827 (amended).
AB 2357 (Cramer); STATS. 1982, Ch 1103
Support: Attorney General; California District Attorneys Association; California Peace Officers Association; California Youth Authority
Opposition: California Probation, Parole and Correctional Association; Judicial Council

Chapter 1103 makes significant changes in the law pertaining to the misdemeanor arrests of any individual.[1] Additionally, Chapter 1103 affects the rights of minors in the juvenile court[2] system.[3]

Misdemeanor Arrests

Under existing law, an individual arrested for allegedly committing a misdemeanor, who does not demand to see a magistrate,[4] may be re-

1. *See* CAL. PENAL CODE §853.6.
2. CAL. WELF. & INST. CODE §245 (definition of juvenile court).
3. *See id.* §§653.1, 827; CAL. EDUC. CODE §48922.
4. CAL. PENAL CODE §807 (definition of magistrate). *See generally id.* §808 (persons designated as magistrates).

leased on a notice to appear that can be filed with a magistrate or the prosecuting attorney.[5] If the notice for appearance is filed with a magistrate, the appearance date must be at least ten days after the arrest.[6] Prior law provided that if the notice was filed with the prosecuting attorney,[7] the appearance date must have been at least 30 days after the arrest.[8] In addition, under prior law further prosecution of the misdemeanor was barred if the prosecuting attorney failed to file a notice or complaint within 25 days of the arrest.[9] Chapter 1103 increases the authority of the arresting officer in setting an appearance date by deleting the 30 day appearance requirement for notices filed with the prosecuting attorney.[10] Chapter 1103 also increases the prosecuting attorney's power by removing the statute of limitations for filing a complaint.[11] If the prosecutor fails to file the notice or formal complaint within 25 days of the arrest, however, further prosecution of the misdemeanor will require either a new citation or an arrest warrant.[12]

Determination of Fitness for Juvenile Court

Existing law provides that upon receipt of an affidavit requesting the commencement of proceedings in juvenile court to declare an individual a ward of the court, the probation officer is to undertake an investigation to determine if juvenile court proceedings are warranted.[13] Chapter 1103 requires the affidavit to be taken immediately to the prosecuting attorney if the offense charged[14] renders the minor unfit to be

5. *See id.* §852.6(a), (d).
6. *See id.* §853.6(b).
7. *Id.* §691(5) (definition of prosecuting attorney).
8. *See* CAL. STATS. 1981, c. 28, §1, at 75 (amending CAL. PENAL CODE §853.6(b)).
9. *See* CAL. STATS. 1981, c. 28, §1, at 75 (amending CAL. PENAL CODE §853.6(e)).
10. *Compare* CAL. PENAL CODE §853.6(b) *with* CAL. STATS. 1981, c. 28, §1, at 75 (amending CAL. PENAL CODE §853.6(b)).
11. *Compare* CAL. PENAL CODE §853.6(e)(3) *with* CAL. STATS. 1981, c. 28, §1, at 75 (amending CAL. PENAL CODE §853.6(e)(3)).
12. *See* CAL. PENAL CODE §853.6(e)(3).
13. *See* CAL. WELF. & INST. CODE §653. *See generally* Marvin F. v. Superior Court, 75 Cal. App. 3d 281, 142 Cal. Rptr. 78 (1977) (the legislative intent behind this law was to divert minors from the court process when the probation officer deemed it to be in the best interests of the minor and society).
14. *See* CAL. WELF. & INST. CODE §707(b) (offenses that would remove the minor from treatment under juvenile court law include the following: murder; arson of an inhabited building; robbery while armed with a dangerous or deadly weapon; rape with force, violence, or threat of great bodily harm; sodomy by force, violence, duress, menace or threat of great bodily harm; lewd or lascivious acts with children under 14 years old by use of force, violence, duress, menace or threat of great bodily harm; oral copulation by force, violence, duress, menace or threat of great bodily harm; penetration of genital or anal openings by foreign objects; kidnapping for ransom; kidnapping for the purpose of robbery; kidnapping with bodily harm; assault with intent to murder or attempted murder; assault with a firearm or destructive device; assault by any means of force likely to produce great bodily injury; discharge of a firearm into an inhabited or occupied building; specified offenses against persons sixty years of age or older, blind persons, paraplegics

treated under juvenile court law[15] and the minor was 16 years of age or older at the time of the offense.[16] If the prosecuting attorney decides treatment as an adult is not warranted, the affidavit is to be returned to the probation officer for any other appropriate action.[17] Under prior law, it was possible for evidence to become stale while the probation officer investigated the circumstances of a particular case.[18] This potential problem is eliminated with the enactment of Chapter 1103 by requiring the affidavit to be taken *immediately* to the prosecuting attorney in the case of serious crimes[19] and permitting the prosecuting attorney to determine if proceedings should be commenced to determine if the minor should be tried as an adult.[20]

Notification of Juvenile Drug Abuse to Parents and District School Superintendent

Prior law *required* the district attorney to provide written notice to the minor's parents *and* to the district school superintendent within forty-eight hours of the filing of a petition in juvenile court or a complaint in any court accusing a pupil or minor of school age[21] of possession, sale, or use of drugs.[22] Since the superintendent of schools was not among those authorized to obtain juvenile records without court approval,[23] this notice requirement appeared to conflict with statutory provisions protecting the privacy of minors.[24] Chapter 1103 resolves this conflict by expressly providing that, although the information given is otherwise subject to these privacy provisions,[25] notice may be given to the minor's parents and the school superintendent without first obtaining a court order in the case of alleged drug abuse by a minor.[26] Additionally, Chapter 1103 eliminates the requirement of compulsory notice.[27]

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or quadraplegics; personal use of a firearm in commission of a felony or attempted felony; and the manufacture, sale or use of specified weapons).

15. *See id.* §§602, 653.1, 707(b).
16. *Id.* §653.1.
17. *Id.*
18. Telephone interview with Pete Sherwood, Office of Assemblyman Cramer, (June 23, 1982) (notes on file at the *Pacific Law Journal*).
19. See note 13 *supra*.
20. CAL. WELF. & INST. CODE §653.1.
21. CAL. EDUC. CODE §48200 (definition of minors of school age).
22. *See* CAL. STATS. 1978, c. 668, §9, at 2154 (amending CAL. EDUC. CODE §48922).
23. *See* CAL. STATS. 1972, c. 1139, §1, at 2206 (amending CAL. WELF. & INST. CODE §827).
24. *See* CAL. WELF. & INST. CODE §827.
25. *See id.*
26. *See id.* §827(b); CAL. EDUC. CODE §48922.
27. *Compare* CAL. EDUC. CODE §48922 *with* CAL. STATS. 1978, c. 668, §9, at 2154.

COMMENT

Chapter 1103 reduces a minor's right to privacy in the case of alleged juvenile drug abuse.[28] This limitation appears to be in conflict with the general philosophy of the California courts in interpreting statutes concerned with the privacy rights of minors.[29] Since juvenile court proceedings have not been considered criminal in nature,[30] the courts have been especially careful to protect a minor from the possible stigma and ostracism that might result from the release of detention or arrest records.[31] The courts found that rehabilitation efforts were best served by maintaining a confidential atmosphere in juvenile court activities[32] and that the juvenile courts were in the best position to determine if the release of record was in the minor's best interests.[33] Since the acquisition of court approval has not been seen as an onerous burden,[34] it appears that Chapter 1103 signifies a change in approach to the rights of minors in the area of juvenile drug abuse by permitting the release of information without approval and by not requiring the release to be limited to sustained petitions.[35]

28. *Compare* CAL. EDUC. CODE §48922 *and* CAL. WELF. & INST. CODE §827 *with* CAL. STATS. 1978, c. 668, §9, at 2154 (amending CAL. EDUC. CODE §48922) *and* CAL. STATS. 1972, c. 1139, §1, at 2206 (amending CAL. WELF. & INST. CODE §827).

29. *See, e.g.*, TNG v. Superior Court, 4 Cal. 3d 767, 775-81, 484 P.2d 981, 985-90, 94 Cal. Rptr. 813, 817-22 (1971); Wescott v. County of Yuba, 104 Cal. App. 3d 103, 108, 163 Cal. Rptr. 385, 389 (1980).

30. *See In re* Dargo, 81 Cal. App. 2d 205, 207, 183 P.2d 282, 283 (1947).

31. *See* 4 Cal. 3d at 775-76, 484 P.2d at 985-86, 94 Cal. Rptr. at 817-18; 104 Cal. App. 3d at 108, 163 Cal. Rptr. at 389.

32. *See* 4 Cal. 3d at 776, 484 P.2d at 987, 94 Cal. Rptr. at 819; *see also* 104 Cal. App. 3d at 108-9, 63 Cal. Rptr. at 389-90. Records may be released to the parents of a minor. If other minors appear in the same record, however, the parents must obtain a court approval for the release of record information. *See id.*

33. *See* 4 Cal. 3d at 781, 484 P.2d at 990, 94 Cal. Rptr. at 822.

34. *See* 104 Cal. App. 3d at 110, 163 Cal. Rptr. at 390.

35. *See* CAL. EDUC. CODE §48922; CAL. WELF. & INST. CODE §827(b).

Criminal Procedure; nolo contendere pleas

Evidence Code §1300 (amended); Penal Code §1016 (amended).
AB 3510 (Goggin); STATS. 1982, Ch 390
Support: California District Attorneys Association; California Peace Officers Association
Opposition: American Civil Liberties Union; Judicial Council

Under existing law, a guilty plea or a final judgment[1] pronouncing a

1. CAL. CIV. PROC. CODE §577 (definition of final judgment).

person guilty of a crime punishable as a felony[2] is admissible as evidence[3] in a civil action[4] to prove any fact essential to the judgment.[5] Prior to the enactment of Chapter 390, the plea of nolo contendere in a criminal action[6] had the same effect as a plea of guilty, except that the plea was inadmissible as evidence in a civil action arising out of the act upon which the criminal prosecution was based.[7]

Chapter 390 declares that it is the intent of the Legislature to assist the victims of crime in obtaining compensation for their injuries from the criminals who inflict them by providing that a plea of nolo contendere to a crime punishable as a felony has the same effect as a plea of guilty for all purposes.[8] For offenses other than those punishable as felonies, however, Chapter 390 continues to prohibit the use of the nolo contendere plea and any admissions required by the court as evidence in subsequent civil actions.[9]

2. CAL. PENAL CODE §17(a) (definition of a felony).
3. CAL. EVID. CODE §140 (definition of evidence).
4. *Id.* §120; CAL. CIV. PROC. CODE §30 (definition of civil action).
5. CAL. EVID. CODE §1300. *See generally* 2 B. WITKIN, CALIFORNIA PROCEDURE *Judgment* §§182, 184 (2d ed. 1970); B. WITKIN, CALIFORNIA EVIDENCE *The Hearsay Rule* §§604, 605 (2d ed. 1966).
6. CAL. EVID. CODE §130 (definition of criminal action).
7. *See* CAL. STATS. 1965, c. 299, §2, at 1345 (enacting CAL. EVID. CODE §1300); CAL. STATS. 1976, c. 1088, §1, at 4930 (amending CAL. PENAL CODE §1016); *see also* Comment, *Nolo Contendere: Its Use and Effect*, 52 CALIF. L. REV. 408 (1964).
8. CAL. STATS. 1982, c. 390, §1, at —; CAL. PENAL CODE §1016; CAL. EVID. CODE §1300. *See generally* CAL. STATS. 1982, c. 514, §1, at — (amending CAL. CIV. PROC. CODE §37) (providing trial calendar preference for civil actions for damages for personal injuries caused by a defendant during the commission of a felony); CAL. GOV'T CODE §13959.
9. CAL. PENAL CODE §1016.

Criminal Procedure; sentencing for kidnapping

Penal Code §209 (amended).
AB 1188 (Costa); STATS. 1982, Ch 4
Support: California District Attorneys Association; California Peace Officers Association; Madera County District Attorney
Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice

Under existing law, anyone convicted of kidnapping for ransom is punished by life imprisonment.[1] In addition, existing law provides that convicted kidnappers are ineligible for parole when the person kid-

1. CAL. PENAL CODE §209(a).

napped suffers either death or bodily harm.[2] With the enactment of Chapter 4, a kidnapper who exposes a victim to a substantial likelihood of death is also ineligible for parole.[3]

Chapter 4 was enacted in direct response[4] to a recent California Court of Appeals decision[5] that granted a possibility of parole to three convicted kidnappers who had been sentenced to permanent life imprisonment.[6] Interpreting the phrase "bodily harm,"[7] the court applied the *Jackson* rule[8] which states that a sentence of permanent life imprisonment is properly given only when the victim has suffered substantial bodily or physical injury unnecessarily inflicted by the kidnapper or proximately caused as a foreseeable consequence of the kidnapper's intentional acts.[9] Although several victims suffered considerable mental anguish in this case, the court held that this was insufficient to justify the harsher mandatory life imprisonment penalty.[10] The new legislation will prevent the possibility of parole being granted in similar cases when the victim has been intentionally confined and exposed to a substantial likelihood of death.[11]

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2. *Id.*
3. *Id.*
4. Assemblyman Jim Costa, Newsletter, March 18, 1981 (copy on file at the *Pacific Law Journal*).
5. People v. Schoenfeld, 111 Cal. App. 3d 671, 168 Cal. Rptr. 762 (1980).
6. *Id.* at 689, 168 Cal. Rptr. at 773.
7. *See id.* at 683-86, 168 Cal. Rptr. 769-71.
8. *See* People v. Jackson, 44 Cal. 2d 511, 517, 282 P. 2d 898, 901 (1955); People v. Isitt, 55 Cal. App. 3d 23, 29, 127 Cal. Rptr. 279, 282 (1976) (application of *Jackson* rule).
9. 111 Cal. App. 3d at 686, 168 Cal. Rptr. at 771. The isolated circumstance of physical restraint or confinement of the victim has been viewed as being a necessary incident to a forcible kidnapping rather than a separate act of bodily harm. Consequently, the mere confinement or physical restraint of the victim has been held to be an insufficient basis for a denial of the possibility of parole. *Id.* at 686-87, 168 Cal. Rptr. at 771; *see also* People v. Soto, 74 Cal. App. 3d 267, 275-76, 141 Cal. Rptr. 343, 347-48 (1977) (injuries sustained when handcuffed are insufficient for imprisonment without parole).
10. 111 Cal. App. 3d at 687-89, 168 Cal. Rptr. at 771-73. Three defendants in the case were convicted of kidnapping a busload of school children and holding them prisoner for 16 hours in a buried moving van on the outskirts of the California village of Chowchilla. Although the trial court found that several victims had suffered the "bodily harm" necessary to invoke the permanent life sentence provision, on appeal this holding was partially reversed with the court ruling that the defendants were eligible for parole. *Id.* at 675-79, 689, 168 Cal. Rptr. at 763-66, 773.
11. CAL. PENAL CODE §209(a).

Criminal Procedure; notification of escape or release of inmates

Penal Code §§11155, 11157, 11158 (new).
AB 2845 (Rogers); STATS. 1982, Ch 1048
Support: Attorney General; Department of Corrections; Department of Finance

Under existing law, criminals nearing the end of their prison terms may be placed in a reentry or work furlough program in order to give them an opportunity to reintegrate into society and to ease the overcrowding in prisons.[1] In an attempt to limit the number of crimes committed by inmates participating in these programs,[2] Chapter 1048 requires the Department of Corrections (hereinafter referred to as the Department), if so requested, to notify the police chief and county sheriff of the area where the inmate will be residing or working, of the inmate's release in the area at least 30 days prior to the actual placement date.[3] The Department must also notify the inmate's crime victim[4] or, in the event of a homicide, the victim's next of kin if the victim or next of kin requests to be notified.[5] However, a current address must be provided by the requesting party.[6]

Chapter 1048 makes similar provisions in the event an inmate escapes from a state prison.[7] In order to minimize the dangers to the crime victim and the public,[8] the Department *must* notify the chief of police and county sheriff of the area where the inmate last resided, and, if so requested, must also notify the crime victim, or victim's next of kin in the event of a homicide.[9] Finally, if the inmate is recaptured, the Department must provide written notice of the recapture to all designated parties within 30 days.[10]

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1. CAL. PENAL CODE §6260; *see* Press Release from Assemblyman Don Rogers, August 26, 1982 (copy on file at the *Pacific Law Journal*).
2. *See* Press Release, note 1 *supra*.
3. CAL. PENAL CODE §11155(a). *See generally id.* §§11150-11152 (similar notification provision on the release of convicted arsonists from prison or state hospital).
4. *Id.* §11158 (definition of victim).
5. *Id.* §11155(a); *see id.* §11157 (victims are informed of this right by a paragraph on their subpoenas).
6. *Id.* §11155(c); *see id.* §11155(a) (this information is confidential and not made available to the inmate).
7. *Id.* §11155(b).
8. Telephone conversation with Beverly Jean Cail, Assemblyman Don Rogers' office, September 7, 1982 (notes on file at the *Pacific Law Journal*).
9. CAL. PENAL CODE §11155(b).
10. *Id.*

Criminal Procedure; expediting the appeals process in death penalty cases

Penal Code §190.7 (new); §1239, 1240.1 (amended, repealed and new); §987 (amended).
SB 294 (Nielsen); STATS. 1982, Ch 917
Support: Attorney General

Opposition: Department of Finance

Under existing law, when the sentencing court[1] imposes the death penalty on a defendant an automatic appeal to the California Supreme Court is triggered.[2] In addition, the Supreme Court must file an opinion reaching the merits of the case within 150 days[3] of certification of the entire record.[4] Previously, the Legislature attempted to address the problem of procedural delay for imposing death penalty sentences;[5] however, it was apparent that the process of establishing the entire record for appeals[6] was still time consuming.[7] Chapter 917 attempts to accelerate the process of appeals in capital punishment cases by defining the entire record,[8] expanding the duties of the trial attorney[9] and abolishing the notice of appeal in capital cases.[10]

The appeals process has been unnecessarily slow due to delays in the certification of the entire record[11] that is necessary before an appeal commences.[12] In an effort to expedite the appeals process,[13] Chapter 917 specifically defines the contents of the entire record.[14] Chapter 917 provides that the entire record must include, but is not limited to,[15] the normal and additional record[16] pertaining to the appeal,[17] a copy of any record or paper on file with the superior court, and a transcript of any oral proceedings reported to the superior court pertaining to the trial.[18] In addition, the court may order the entire record to include municipal court or settlement proceedings pertaining to the case.[19] Moreover, Chapter 917 provides that the Judicial Council may adopt consistent rules specifically pertaining to the content, preparation and

1. *See* CAL. PENAL CODE §12 (the sentencing court determines and imposes punishment). *See generally id.* §13 (limits of punishment stated); People v. Bob, 29 Cal. 2d 321, 175 P.2d 12 (1946).
2. CAL. PENAL CODE §1239(b). *See generally* People v. Stanworth, 71 Cal. 2d 820, 80 Cal. Rptr. 49, 457 P.2d 889 (1969).
3. CAL. PENAL CODE §190.6.
4. CAL. R. CT. 33(c), 35.
5. *See* 9 PAC. L. J. REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 439, 445 (1978); Senator Jim Nielsen, Press Release, Aug. 25, 1982 (copy on file at the *Pacific Law Journal*).
6. *See* Christian, *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 STAN. L. REV. 676, 678 (1970).
7. *See* Press Release, *supra* note 5.
8. CAL. PENAL CODE §190.7.
9. *Id.* §§1239(b), 1240.1(b). *See generally id.* §987(b).
10. *Id.* §1240.1(a)(2).
11. Senator Jim Nielsen, Press Release, June 1, 1982 (copy on file at the *Pacific Law Journal*).
12. *See* CAL. R. CT. 33(c), 35(c).
13. *See* Press Release, *supra* note 5.
14. CAL. PENAL CODE §190.7.
15. *See id.* §1247k.
16. *See id.* §1246; CAL. R. CT. 33.
17. CAL. PENAL CODE §190.7(a).
18. *Id.* §190.7(b).
19. *Id.*

certification of the entire record on appeal in cases in which the death penalty is imposed.[20]

Past practice apparently dictated that the appellant's counsel assumes the burden of certifying the entire record.[21] Since the trial attorney is more familiar with the record,[22] Chapter 917 requires defendant's trial attorney to represent the defendant until the entire record on automatic appeal is certified[23] and to check that the entire record has been prepared without omissions or errors.[24] These duties[25] imposed on the trial counsel, however, do not preclude the appellate counsel from requesting additions or corrections to the entire record on appeal.[26]

Prior law required that the defendant's attorney give notice of appeal to the court in *any* criminal, juvenile or civil commitment case.[27] Chapter 917 expedites the appeals process by limiting the duty of notice of appeal to noncapital cases.[28] Additionally, Chapter 917 requires the court to inform the defendant's trial counsel of the additional duties[29] including the duty of continuously representing the defendant until the entire record has been certified.[30] The provisions pertaining to the continued representation by the defendant's attorney and the abolishment of the notice requirement in Chapter 917 will be repealed on January 1, 1989.[31]

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20. *See id.*
21. *See* Senator Jim Nielsen, Press Release, Feb. 13, 1981 (copy on file at the *Pacific Law Journal*).
22. *See id.*
23. CAL. PENAL CODE §1240.1(b)(1).
24. *See id. See generally id.* §§987(b) (the court is to inform the defendant's counsel of additional duties in capital cases), 1239(b).
25. *See id.* §1240.1(b)(1).
26. *Id.* §1240.1(b)(2).
27. *See* CAL. STATS. 1978, c. 1385, §2, at 4589 (enacting CAL. PENAL CODE §1240.1(b)).
28. *See* CAL. PENAL CODE §1240.1(a)(2).
29. *See id.* §987(b).
30. *See id.* §1240.1(b)(1).
31. CAL. STATS. 1982, c. 917, §7, at —.

Criminal Procedure; sexual exploitation of children

Penal Code §§1524, 11107, 11165, 11166 (amended).
AB 3641 (Bane); STATS. 1982, Ch 438
Support: Los Angeles City Attorney; Los Angeles County Municipal Court Judges Association
SB 658 (Ellis); STATS. 1982, Ch 1356
(Effective September 23, 1982)

Support: Attorney General; California Peace Officers Association; Peace Officers Research Association of California
SB 1848 (Watson); STATS. 1982, Ch 905
Support: California Peace Officers Association; Department of Finance; Northern California Juvenile Officers Association

Children involved in the production of pornography are being sexually abused.[1] Furthermore, commentaries have stated that the distribution of the obscene material contributes to other incidences of child molestation by persons possessing the pornography.[2] Recent legislation imposed misdemeanor penalties[3] on persons who sexually exploit a child by developing, duplicating, printing, or exchanging any film, photograph, videotape, negative, or slide that depicts sexual conduct[4] by a person under 14 years of age.[5] Chapter 438 facilitates the prosecution of this type of sexual exploitation[6] by expressly providing that a search warrant may be issued to seize evidence tending to show that the crime has occurred or is occurring.[7]

In a related change, Chapter 905 promotes cooperation in enforcing child pornography laws by requiring any commercial film and photographic print processor[8] who observes or learns of any film, photograph, negative, videotape, or slide that depicts a child under 14 years of age engaging in sexual conduct[9] to immediately telephone the proper law enforcement agency and report the suspected child abuse.[10] In addition, the processor must send a written report and a copy of the film, photograph, negative, videotape, or slide to the agency within 36 hours of receiving the information.[11] Failure to make these reports could re-

1. *See* New York v. Ferber, 102 S.Ct. 3348, 3350, 3355 (1982) (declaring that the exploitive use of children in the production of pornography is a serious national problem and stating that the distribution of materials depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children). *See also* ATTORNEY GENERAL'S ADVISORY COMMITTEE, REPORT TO THE ATTORNEY GENERAL ON CHILD PORNOGRAPHY 13-17 (1977). *See generally* Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 810-17 (1978).

2. ATTORNEY GENERAL'S ADVISORY COMMITTEE, REPORT TO THE ATTORNEY GENERAL ON CHILD PORNOGRAPHY 13-17 (1977). *See generally* Comment, *supra* note 1, at 810-17.

3. The penalty includes a fine up to $2,000, imprisonment in the county jail for up to one year, or both. CAL. PENAL CODE §311.3(d).

4. *Id.* §311.3(b) (definition of sexual conduct for this section only).

5. *Id.* §311.3 (enacted by CAL. STATS. 1981, c. 1056, §1, at —). These penalties do not apply to an employee of a commercial film developer who has no financial interest in the business. *Id.* §311.3(e). *See generally* 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 640 (1982).

6. *See* CAL. PENAL CODE §311.3.

7. *Id.* §1524(a)(5).

8. *Id.* §11165(l) (definition of commercial film and photographic print processor).

9. *Id.* §11166(c) (definition of sexual conduct for the purpose of this section only).

10. *Id.* §§11166(c), 11167 (contents of telephone report).

11. *Id.* §§11166(c), 11168 (form of written report).

sult in a maximum fine of $500, imprisonment in the county jail for up to six months, or both.[12] Finally, Chapter 1356 encourages prompt action to protect children[13] by mandating that the sheriff or police chief make daily reports to the Department of Justice of any instances of suspected sexual exploitation of a child.[14] The report could eventually be used to facilitate a possible statewide investigation.[15]

12. *Id.* §11172(b).
13. CAL. STATS. 1982, c. 1356, §3, at—.
14. CAL. PENAL CODE §11107(b). Sexual exploitation for these purposes includes engaging a minor in acts of prostitution, preparation of child pornography, or any other conduct that appears to encourage child molestation. *Id.*
15. *See* Younger v. Berkeley City Council, 45 Cal. App. 3d 825, 831, 119 Cal. Rptr. 830, 833 (1975). *See generally* CAL. PENAL CODE §§11050, 11105, 11105.1.

Criminal Procedure; controlled substances

Health & Safety Code §§11366.5, 11366.7 (new); 11100, 11100.1, 11105, 11383 (amended).
AB 1916 (Davis); STATS. 1982, Ch 1279
Support: California Narcotics Officers Association; California Peace Officers Association; Department of Corrections; Department of Finance

The incidence of use of phencyclidine (hereinafter referred to as PCP) is increasing although the dangerous side effects have become well known to the public.[1] One reason for the popularity of PCP is that it can easily be manufactured from a variety of substances.[2] The apparent purpose of Chapter 1279 is to discourage the manufacture of PCP and other illicit drugs.[3] Chapter 1279 attempts to accomplish this by broadening the list of substances that are illegal for a person to possess[4] with the intent to manufacture PCP or an analog.[5] Chapter 1279

1. *See* Santo, *Patterns of Drug Use and Characteristics of Adolescent PCP Users in Drug Abuse Treatment*, 9 CONTEMPORARY DRUG PROBLEMS 369, 369-371, 381-385 (1980).
2. *See* Telephone conversation with Jim Rushford, Legislative Aide to Senator Davis (June 23, 1982) (notes on file at the *Pacific Law Journal*).
3. *See id.*; CAL. BUS. & PROF. CODE §4031; CAL. HEALTH & SAFETY CODE §11014 (definition of drug).
4. *See* People v. Camp, 104 Cal. App. 3d 244, 247-48, 163 Cal. Rptr. 510, 512 (1980) (the elements of unlawful possession of a controlled substance are dominion and control over the contraband in a quantity usable for consumption or sale, knowledge of its presence and knowledge of its restricted, dangerous drug character); People v. Hampton, 115 Cal. App. 3d 515, 523 171 Cal. Rptr. 312, 316 (1981) (mere momentary contact does not necessarily constitute possession); People v. Jenkins, 91 Cal. App. 3d 579, 583, 154 Cal. Rptr. 309, 311 (1979) (possession may be physical or constructive); People v. Vasquez, 1 Cal. App. 3d 769, 777-78, 82 Cal. Rptr. 131, 136 (1961) (each of the essential elements of possession can be proved with circumstantial evidence).

also expands the list of controlled substances[6] that must be reported when transferred[7] and establishes penalties for reporting violations.[8] In addition, Chapter 1279 prohibits the furnishing[9] of any chemical, chemical equipment, or area for the unlawful manufacture, storage or distribution of any controlled substance.[10]

Possession

Existing law prohibits the possession of certain chemical precursors[11] if the person in possession has the intent to manufacture amphetamines or PCP.[12] In addition, the possession of a substance used to manufacture these precursors or the possession of any compound containing these precursors[13] is deemed to be possession of the precursor themselves.[14] Chapter 1279 expands the list of precursors that are illegal to possess under these circumstances to include pyrolidine and morpoline.[15] Chapter 1279 also prohibits the possession of precursors of PCP if possessed with the intent to make certain analogs of that drug.[16]

Reporting

Existing law requires any person who legally furnishes[17] certain controlled substances[18] or their precursors, or receives them from an out of state source, to submit a report of the transaction to the Department of

5. *Compare* CAL. HEALTH & SAFETY CODE §11383(b) *with* CAL. STATS. 1980, c. 749, §3, at 2247.
6. *Id.* §11007 (definition of a controlled substance).
7. CAL. CIV. PROC. CODE §1800(a)(1)(A)(9) (definition of transfer).
8. CAL. HEALTH & SAFETY CODE §§11100(a), 11100(b), 11100.1, 11105(b).
9. CAL. BUS. & PROF. CODE §4048.5, CAL. HEALTH & SAFETY CODE §11016 (definition of furnish).
10. CAL. HEALTH & SAFETY CODE §§11366.5, 11366.7.
11. *Id.* §11383(b) (the specified precursors are methylamine, phenyl-2-propanone, ethylamine, piperdine, and cyclohexanone).
12. *Id.* §§11383(a), (b).
13. *Id.* (the precursors to PCP are piperdine and cyclohexanone).
14. *Id.* §11383(c).
15. *Compare id.* §11383 *with* CAL. STATS. 1980, c. 749, §3, at 2247.
16. *Id.* §11383(b). The analogs of PCP consist of 1-(1-phenylcyclohexyl) pyrolidine, 1-(1-(2-theinyl) cyclohexyl) piperdine and 1-(1-phenylcyclohexyl) morpoline. *Id.* §11055(e).
17. *Id.* §11100(c). Those persons who legally furnish the specified controlled substances who are not required to make a report of its transfer include: (1) any physician, dentist, podiatrist, or veterinarian who administers these substances to his patients; (2) any pharmicist or other authorized person who furnishes these substances upon the prescription of a physician, podiatrist, dentist, or veterinarian; or (3) any manufacturer or wholesaler licensed by the Board of Pharmacy who sells, transfers or otherwise furnishes any of these substances to a licensed pharmacist, physician, podiatrist, dentist, or veterinarian. *Id.*
18. *Id.* §11100(a). The specified controlled substances are as follows: phenyl-2-propanone, methylamine, ethylamine, D-lysergic acid, ergotamine tertrate, diethyl malonate, malonic acid, ethyl malonate, barbituric acid, piperdine, N-actylanthranilic acid, pyrolidine, phenylacetic acid, anthranilic acid and morpoline. *Id.*

Justice.[19] Chapter 1279 adds precursors of amphetamines, quaaludes, and PCP[20] to the list of substances that must be reported when transferred.[21] Under Chapter 1279, first time offenders convicted of failure to submit a report will be imprisoned in the county jail for a period up to six months, fined an amount up to $5,000, or both.[22] Subsequent offenders will be imprisoned in the state prison or county jail for a period up to one year, fined an amount up to $100,000, or both.[23] Under prior law, the making of a false statement on this report was only punishable by imprisonment in the state prison or county jail for a period up to one year.[24] Chapter 1279 now provides that when a person makes a false statement on this report for the first time, that person will be punished by imprisonment in either the county jail for one year or in the state prison, by the fine not exceeding $5,000, or both.[25] Under Chapter 1279, subsequent violators will be imprisoned in the state prison for a period of two, three, or four years, fined an amount up to $100,000, or both.[26]

Supplying to Manufacturers

Chapter 1279 prohibits retailers[27] and wholesalers[28] from knowingly[29] selling[30] any chemical, supply, or equipment that will be used to manufacture or prepare[31] a controlled substance intended for illegal sale or distribution.[32] Additionally, Chapter 1279 prohibits any person from knowingly providing a place for the manufacture, storage, or eventual sale or distribution of those substances.[33] Violators of these laws will be punished with imprisonment in the county jail for not more than one year or imprisonment in the state prison.[34] The punishment for subsequent convictions for knowingly providing a place for drug dealings will be imprisonment in the state prison for two, three, or four years.[35]

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19. *Id.* §§11100(a), 11100.1(a).
20. *Id.* §11100(a) (pyrolidine, phenylacetic acid, anthranilic acid, morpoline).
21. *Compare id.* §11100(a) *with* CAL. STATS. 1980, c. 786, §1.5, at 2383.
22. *Id.* §§11100(f)(1), 11100.1(b)(1).
23. *Id.* §§11100(f)(2), 11100.1(b)(2).
24. CAL. STATS. 1979, c. 784, §2, at 2674 (amending CAL. HEALTH & SAFETY CODE §11105).
25. CAL. HEALTH & SAFETY CODE §11105(b)(1).
26. *Id.* §11105(b)(2).
27. CAL. REV. & TAX. CODE §6015 (definition of retailer).
28. CAL. BUS. & PROF. CODE §4038.
29. CAL. PENAL CODE §7(5) (definition of knowingly).
30. CAL. BUS. & PROF. CODE §§12009, 13401(a), 17022, 19003 (definition of sell).
31. CAL. EDUC. CODE §32380(b) (definition of prepare).
32. CAL. HEALTH & SAFETY CODE §11366.7.
33. *Id.* §11366.5.
34. *Id.* §§11366.5, 11366.7.
35. *Id.* §11366.5.

Criminal Procedure; controlled substances—probation, sentence suspension, juvenile law

Health & Safety Code §11055 (amended); Penal Code §1203.04 (new) §§1203, 1203.07 (amended); Welfare and Institutions Code §707 (amended).
SB 51 (Greene); STATS. 1982, Ch 1282
Support: Attorney General; County of Los Angeles
Opposition: Department of Finance
SB 902 (O'Keefe); STATS. 1982, Ch 1283
Support: California Peace Officers Association; Department of Finance; Santa Clara County Sheriff

In 1978 the California Legislature increased the penalties relating to the illegal sale,[1] manufacture,[2] distribution,[3] and possession[4] of the drug phencyclidine hydrochloride (hereinafter referred to as PCP) and its compounds, ostensibly in response to the reported devastating effects of the drug.[5] Chapter 1282 places further restraints on persons convicted of illegal activities relating to PCP, including new restrictions on grants of probation.[6] Similarly, Chapter 1283 imposes new probation restrictions on persons convicted of illegal activities relating to the sale of cocaine and methamphetamine.[7]

Prohibition of Probation

Under current law, the courts have no jurisdiction to grant probation or to suspend the imposition or execution of sentence for any person convicted of selling, offering to sell, manufacturing, or possessing for sale one-half ounce or more of PCP.[8] Chapter 1282 provides that those persons convicted of transporting or importing PCP for sale; offering to transport or import PCP for sale; attempting to transport or import PCP for sale; and administering or offering to administer PCP;[9] must

1. CAL. HEALTH & SAFETY CODE §§11378.5, 11379.5.
2. *Id.* §11383.
3. *Id.* §§11380.5, 11382.
4. *Id.* §11377.
5. 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 406 (1979).
6. *See* CAL. PENAL CODE §§1203(e)(8), 1203.07(a)(4), (5), (6); CAL. WELF. & INST. CODE §707(b)(20).
7. *See* CAL. PENAL CODE §1203.04.
8. CAL. PENAL CODE §1203.07(a)(4), (5).
9. *Compare id.* §1203.07(a)(5), *with* CAL. STATS. 1980, c. 1223, §4, at 4146 (amending CAL. PENAL CODE §1203.07).

also be denied a grant of probation or suspension of sentence.[10] Furthermore, Chapter 1282 broadens the law pertaining to possession of PCP by providing that anyone convicted of possessing for sale one-half ounce or more of any salt, solution, compound, or mixture containing PCP or one of its analogs must also be denied a grant of probation and the suspension of sentence.[11] In addition, any person who knowingly furnishes or gives away PCP may not be granted probation except in unusual cases when the interests of justice would best be served.[12]

Under Chapter 1283, a person convicted of possessing for sale one ounce or more of cocaine[13] or methamphetamine[14] may be granted probation only in an unusual case when the interests of justice would best be served.[15] If probation is granted, the court must specify on the record the circumstances which justify the probation grant.[16]

Presumption of Fitness for Juveniles

Currently, a minor charged with a criminal offense is within the jurisdiction of the juvenile court.[17] A presumption, however, arises whenever a minor 16 years of age or older allegedly commits a specified offense;[18] the minor is presumed not to be a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon clear and convincing evidence, that the minor would be amenable to the care, treatment, and training programs available through the facilities of the juvenile court.[19] Chapter 1282 ex-

10. *Id.* §§1203.07(a)(6), (7).
11. CAL. PENAL CODE §1203.07(a)(4); CAL. HEALTH & SAFETY CODE §11055(e).
12. CAL. PENAL CODE §1203(e)(8). *See generally* People v. Wilson, 34 Cal. App. 3d 524, 527, 110 Cal. Rptr. 104, 106 (1973).
13. *Id.* §1203.04(b)(1).
14. *Id.* §1203.04(b)(2).
15. *Id.* §1203.04(a).
16. *Id.*
17. CAL. WELF. & INST. CODE §602.
18. *See id.* §707(b) (the specified offenses are murder; arson of an inhabited building; robbery while armed with a dangerous or deadly weapon; rape with force, violence or threat of great bodily harm; sodomy by force, violence, duress, menace, or threat of great bodily harm; a lewd or lascivious act upon or with the body, or any part or member thereof of a child under the age of 14 years by use of force, violence, duress, menace, or threat of great bodily harm; oral copulation by force, violence, duress, menace, or threat of great bodily harm; penetration of the genital or anal openings of another person by any foreign object, substance, instrument, or device when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; kidnapping for ransom; kidnapping for purpose of robbery; kidnapping with bodily harm; assault with intent to murder or attempted murder; assault with a firearm or destructive device; assault by any means of force likely to produce great bodily injury, discharge of a firearm into an inhabited or occupied building; murder, violent assault, robbery, kidnapping, first-degree burglary, or rape accompanied by great bodily injury against a person who is 60 years of age or older or is blind, a paraplegic, or a quadriplegic and such disability is known or reasonably should be known to the person committing the crime).
19. *See* CAL. WELF. & INST. CODE §§707(b), (c). *See also* People v. Superior Court of San

pands the range of these specified offenses by adding a provision which stipulates that a minor sixteen years of age or older charged with manufacturing, compounding, or selling one-half ounce or more of any salt, solution, compound, or mixture containing PCP is presumed to be unfit to be treated under juvenile court law.[20]

In summary, Chapters 1282 and 1283 require imprisonment of persons convicted of almost any illegal activity involving PCP[21] and deny probation and sentence suspension to sellers of significant quantities of cocaine and methamphetamine.[22] Additionally, Chapter 1282 raises a presumption of unfitness for trial in juvenile court[23] for minors charged with manufacturing, selling, or compounding one-half ounce or more of any substance containing PCP.[24]

Francisco, 119 Cal. App. 3d 162, 174-87, 173 Cal. Rptr. 788, 794-802 (1981). There is some doubt about the importance of shifting the presumption of fitness for the juvenile court process. *See* Edwards, *The Case for Abolishing Fitness Hearings in Juvenile Court*, 17 SANTA CLARA L. REV. 595, 605 (1977); Hicks, *Prosecutors in the Juvenile Court Process*, 5 PEPPERDINE L. REV. 741, 758-59 (1978). *But see* People v. Superior Court of Yuba County, 122 Cal. App. 3d 263, 267-68, 175 Cal. Rptr. 733, 735-36 (1981).

20. CAL. WELF. & INST. CODE §707(b)(20). Chapter 1282 also expands the list of specified offenses that deny a juvenile the presumption of fitness for juvenile court to include: (1) minors who commit a felony witness intimidation, CAL. WELF. & INST. CODE §707(b)(19), CAL. PENAL CODE §§136.1, 137; (2) minors who personally use a firearm in the commission of a felony, CAL. WELF. & INST. CODE §707(b)(17), CAL. PENAL CODE §12022.5; and (3) minors who are illegally involved with specified types of deadly weapons, including cane guns, wallet guns, and sawed-off shotguns, CAL. WELF. & INST. CODE §707(b)(18), CAL. PENAL CODE §12020(a).

21. *See* CAL. PENAL CODE §§1203, 1203.07.

22. *Id.* §1203.04.

23. *See* People v. Superior Court (Steven S.), 119 Cal. App. 3d 162, 177-78, 173 Cal. Rptr. 788, 796-97 (1981).

24. CAL. WELF. & INST. CODE §§707(b), (c).