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Criminal Procedure

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Criminal Procedure

Criminal Procedure; peremptory challenges

Penal Code § 1070 (amended).
AB 180 (Harris); 1987 STAT. Ch. 125

Prior law provided that if an offense is punishable by either death or life imprisonment,¹ the prosecution and the defendant are each entitled to twenty-six peremptory challenges.² Under Chapter 125, the prosecution and defendant are each entitled to twenty peremptory challenges.³

NJB

1. *See* *People v. Shaw*, 237 Cal. App. 2d 606, 612, 47 Cal. Rptr. 96, 100 (1965), *cert. denied*, 384 U.S. 964 (1966) (the defendant is entitled to 20 peremptory challenges in capital cases or cases in which a life sentence is in terms affixed by the Legislature); *People v. Marks*, 184 Cal. App. 3d 458, 462, 229 Cal. Rptr. 107, 111 (1986) (California Penal Code section 1070 applies to offenses that carry a mandatory sentence of life imprisonment). *See also* *People v. Menne*, 4 Cal. App. 2d 91, 107, 41 P.2d 383, 390 (1935) (contention that defendant was entitled to 40 peremptory challenges since charged with 4 separate counts of issuing and passing fictitious checks, was without merit). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 405(a) (1963 & Supp. 1983) (offenses punishable by life imprisonment under California Penal Code section 1070 are only those crimes for which the statute prescribes the term of life).

2. CAL. PENAL CODE § 1070(a); *see also id.* § 1069 (definition of peremptory challenge). *See generally* *People v. Yates*, 34 Cal. 3d 644, 648, 669 P.2d 1, 3, 194 Cal. Rptr. 765, 767 (1983) (underlying purpose of California Penal Code section 1070 is to allow greater protection to criminal defendants who, if convicted, are likely to receive the most severe penalties). *See also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 398 (1963 & Supp. 1983) (regarding challenging jurors for cause and peremptory challenges). *See generally* *Review of Selected 1978 California Legislation*, 10 PAC. L.J. 247, (1981) (peremptory challenges in civil and criminal cases).

3. CAL. PENAL CODE § 1070. *Compare* 1927 Cal. Stat. ch. 630, sec. 1, at 1062, (state and defendant given 20 peremptory challenges) *and* 1975 Cal. Stat. ch. 593, sec. 8, at 1310 (increasing peremptory challenges to 26) *with* CAL. PENAL CODE § 1070(a) (1987 amendment restores the number of peremptory challenges permitted prior to the 1975 amendment).

Criminal Procedure; parole—county of release

Penal Code § 3003 (amended).
AB 629 (Stirling); 1987 STAT. Ch. 283

Existing law provides that an inmate¹ who is released on parole² must be returned to the county where the inmate was committed.³ In apparent response and in opposition to the decision of the California Court of Appeal in *McCarthy v. Superior Court*,⁴ Chapter 283 provides that the county where the inmate was committed means the county where the crime occurred.⁵

JTM

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1. CAL. PENAL CODE § 11189(d) (definition of inmate).
 2. *See generally id.* §§ 3040-3065 (procedures and conditions of parole).
 3. *Id.* § 3003(a). An inmate may be returned to another county if the authority setting the conditions of parole decides that return to another county would be in the best interests of the public and parolee. *Id.* § 3003(b). In making such a decision, the court may consider: (1) The need to protect the life or safety of the victim, the parolee, a witness, or any other person; (2) public concern that would reduce the chance that the inmate's parole would be successful; (3) the existence of a work offer or an educational program; (4) the last legal residence of the inmate in another county; (5) the existence of family in another county; and (6) lack of outpatient programs for parolees suffering from mental disorders. *Id.* § 3003(b)(1)-(6).
 4. 191 Cal. App. 3d 1023, 236 Cal. Rptr. 833 (1987) (holding that the county of commitment was the county in which the defendant was committed to prison).
 5. CAL. PENAL CODE § 3003(a).

Criminal Procedure; out-of-state inmate witnesses

Penal Code §§ 1334.1, 1334.2, 1334.3 (amended).
SB 613 (Presley); 1987 STAT. Ch. 322

Under existing law, an out-of-state witness¹ in a criminal case may receive travel expenses² and twenty dollars for each day of travel or

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1. *See* PENAL CODE § 1334.1(a) (definition of witness).
 2. If the witness is subpoenaed to attend and testify in California, he or she must be paid 10 cents for each mile necessarily traveled if the witness elects surface travel, or the minimum round trip scheduled airline fare plus 20 cents per mile for surface travel at either end of the flight. *Id.* § 1334.3(a).

attendance at the proceedings.³ In lieu of per diem,⁴ Chapter 322 specifically provides that an out-of-state witness who is an inmate of a penal facility may receive food and lodging in the appropriate penal facility of the county where the out-of-state witness is attending the proceedings.⁵

AGA

3. *Id.* If a person in any state is a material witness in a prosecution pending in California, the court may issue a certificate specifying the number of days the witness will be required. *Id.*

4. Per diem means a sum of money the purpose of which is to provide for personal expenses, including food and lodging. *Id.* § 1334.1(d).

5. *Id.* § 1334.3(b).

Criminal Procedure; continuance for good cause— prosecutor's unavailability

Penal Code § 1048.1 (new); §§ 859b, 1050 (amended).
AB 2452 (Bronzan); 1987 STAT. Ch. 461
(Effective September 9, 1987)

Existing law requires a magistrate to dismiss a felony complaint when the defendant is in custody and has not pleaded guilty, and the preliminary hearing is set or continued ten court days beyond the arraignment or plea.¹ The complaint need not be dismissed when (1) the defendant waives the right to the preliminary examination within the ten court days, or (2) the prosecution establishes good cause for a continuance.² Existing law further provides that to continue any hearing in a criminal proceeding, including the trial, the moving party must (1) show good cause, (2) file and serve written notice together with affidavits and declarations detailing the specific facts showing that a continuance is necessary, and (3) the attorney

1. CAL. PENAL CODE § 859(b). The defendant may not be released from custody even though the preliminary hearing is continued beyond the 10-day court period if: (a) The defendant requests the continuance; (b) the defendant is charged with a capital offense; (c) a necessary witness is unavailable due to the actions of the defendant; (d) counsel is ill; (e) counsel is unexpectedly engaged in a jury trial; or (f) appointment of new counsel is required due to unforeseen conflicts of interest. *Id.*

2. *Id.* See generally *Review of Selected 1982 California Legislation*, 13 PAC. L.J. 656 (1982) (examines grounds for dismissal of charges).

must notify the calender clerk that the attorney has a conflict in scheduling within two court days of learning of the conflict.³ Existing law states that when deciding whether good cause for a continuance in any criminal proceeding has been shown, the court must consider the general convenience and prior commitments of all witnesses, including peace officers.⁴ Chapter 461 expands existing law by requiring the court to consider whether the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court.⁵

Existing law provides that a trial must commence within thirty days after arraignment in all criminal actions in which a minor or person seventy years of age or older is detained as a material witness or is the victim, or where any person is a victim of specified sex offenses.⁶ Existing law also requires that trials regarding the specified sex offenses have priority on the court calender before all other criminal actions.⁷ With the enactment of Chapter 461, a judge must use reasonable efforts to avoid scheduling the trial on the same day as another trial involving the same prosecuting attorney when setting sexual assault and child abuse cases for trial.⁸ Chapter 461 is meant to enable a minor who is an alleged victim of sexual assault or a child abuse crime to speak more freely and accurately of the child's experiences by minimizing the number of prosecuting attorneys that the minor will face and thereby providing a less threatening judicial environment.⁹

LAL

3. CAL. PENAL CODE § 1050(b). See generally *Review of Selected 1985 California Legislation*, 17 PAC. L.J. 688 (1986) (examines procedure for continuances). See also *Review of Selected 1986 California Legislation*, 18 PAC. L.J. 578 (1987) (examines attorney's notification procedure for conflict in court hearing schedules).

4. CAL. PENAL CODE § 1050(g). See generally B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 278, 288 (1963 & Supp. 1985) (examines grounds for continuance).

5. CAL. PENAL CODE §§ 859b, 1050(g) (continuances are limited to ten days for a hearing in a criminal proceeding, including a trial, and three days for a preliminary examination).

6. The specified sex offenses to be given precedence over all other criminal actions in order of trial are rape, aiding or abetting rape, cruel punishment of children, corporal punishment of children, incest, sodomy, lewd or lascivious acts involving children, penetration by foreign object. *Id.* § 1048(b). See *id.* §§ 261 (definition of rape), 264.1 (aiding or abetting rape), 273a (cruel punishment of children), 273d (corporal punishment of children), 285 (incest), 286 (sodomy), 288 (lewd or lascivious acts involving children), 289 (penetration by foreign object).

7. *Id.* § 1048.

8. See *id.* § 1048.1.

9. 1987 Cal. Stat. ch. 461, sec. 4, at _____. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of article IV of the constitution. *Id.*

Criminal Procedure; witnesses—intimidation

Penal Code § 136.7 (new).
AB 2530 (Jones); 1987 STAT. Ch. 520

Existing law prohibits any person from knowingly and maliciously preventing or dissuading, or attempting to prevent or dissuade, any victim¹ or witness² from attending or giving testimony at any trial.³ Chapter 520 provides that any person imprisoned for a sexual offense, who knowingly reveals the name and address of any witness or victim of that offense to any prisoner, is guilty of a felony.⁴

JTM

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1. See CAL. PENAL CODE § 136(3) (definition of victim).
 2. See *id.* § 136(2) (definition of witness).
 3. *Id.* § 136.1(a) (violators are guilty of a misdemeanor). See *id.* § 17(b), (c) (definition of misdemeanor).
 4. *Id.* § 136.7. The name or address must be revealed with the intent of having the other prisoner intimidate or harass the witness or victim through the initiation of unauthorized correspondence. See *id.* § 17(a) (definition of felony).

Criminal Procedure; mentally disordered offenders—treatment

Evidence Code § 1017 (amended); Penal Code § 2981 (new); §§ 1615, 1617, 1618, 1619, 1620, 2962, 2966, 2972, 2978 (amended).
SB 425 (McCorquodale); 1987 STAT. Ch. 687

Existing law provides, with specified exceptions,¹ that a communication² between a patient³ and the patient's psychotherapist⁴ is privileged information.⁵ Chapter 687 adds an exception to the

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1. CAL. EVID. CODE §§ 1016 (patient-litigant exception), 1017 (court appointed psychotherapist exception), 1018 (exception for crime or tort), 1019 (exception for parties claiming through deceased patient), 1020 (exception for breach of duty arising out of psychotherapist-patient relationship), 1021 (exception for intention of deceased patient concerning writing affecting property interest), 1023 (exception for proceeding to determine sanity of criminal defendant), 1024 (exception for patient dangerous to himself or others), 1025 (exception for proceeding to establish competence), 1026 (exception for required report), 1027 (privilege nonexistent if the patient is a child under 16 and probable victim of a crime).
 2. *Id.* § 1012 (confidential communication between patient and psychotherapist).
 3. *Id.* § 1011 (definition of patient).
 4. *Id.* § 1010 (definition of psychotherapist).
 5. *Id.* § 1014. See *id.* §§ 1013 (holder of the privilege), 1015 (when psychotherapist required to claim privilege).

privilege when the Board of Prison Terms⁶ appoints a psychotherapist to examine a prisoner under the Mental Health Conditional Release Program.⁷

As a condition of parole, existing law provides that a prisoner may be required to be treated by the State Department of Mental Health.⁸ The prisoner, however, must meet specified criteria⁹ as certified by the chief psychiatrist of the Department of Corrections.¹⁰ Chapter 687 requires the certification to include findings that the prisoner has been in treatment for ninety days prior to release and the crime the prisoner committed was a violent offense.¹¹ Under Chapter 687, the professionals appointed to examine the prisoner¹² must inform the prisoner that the purpose of the examination is not treatment but to determine whether the prisoner meets the criteria to be involuntarily treated as a mentally disordered offender.¹³ Chapter 687 further adds to existing law by providing that the certified records¹⁴ concerning the prisoner from any prison, jail, or state hospital may be used as evidence to prove that the prisoner has received ninety days of treatment within the year prior to release.¹⁵

RWL

6. CAL. PENAL CODE § 5075 (composition of Board of Prison Terms).

7. CAL. EVID. CODE § 1017. Chapter 687 changes the name of the Conditional Release Program to the Mental Health Conditional Release Program. CAL. PENAL CODE § 1615.

8. CAL. PENAL CODE § 2962(d).

9. The prisoner must have a severe mental disorder that cannot be kept in remission without treatment. *Id.* The disorder must have been an aggravating factor in the prisoner's criminal behavior. *Id.* The prisoner must have been convicted of a violent felony and have received treatment for ninety days or more prior to release. *Id.*

10. *Id.* See *id.* §§ 5000 (providing for Department of Corrections in the Health and Welfare Agency), 5001 (composition of the Department of Corrections).

11. *Id.* § 2962(d). The prisoner must have used force, violence, or caused serious bodily injury in committing the crime. *Id.*

12. See *id.* § 2978 (requirements for appointment of professionals).

13. *Id.* § 2962(d).

14. Certified copies of the records may also be used. *Id.* § 2981.

15. *Id.*

Criminal Procedure; prosecuting witnesses—support persons for a minor

Penal Code § 868.5 (amended); Welfare & Institutions Code § 676 (amended).

AB 1068 (La Follette); 1987 STAT. Ch. 704 .

Under existing law, juvenile proceedings are closed to the public with certain exceptions.¹ Existing law permits a prosecuting witness under seventeen years of age to have one or two family members present as support persons² while the witness testifies at the preliminary hearing or trial of an adult accused of committing specified crimes³ upon the witness.⁴ Under Chapter 704, the victim may have support persons in attendance at a proceeding to adjudge a minor⁵ a ward of the juvenile court⁶ when the minor has committed specified acts⁷ upon a minor witness.⁸ Chapter 704 requires the judge to caution the support person or persons not to prompt, sway, or influence the minor witness.⁹ Chapter 704 also requires the judge in a juvenile proceeding to advise the support persons that juvenile proceedings are confidential and may not be discussed with any person other than those present.¹⁰

SSS

1. CAL. WELF. & INST. CODE § 676. The exceptions are proceedings to adjudge a minor a ward for murder; arson; armed robbery; forcible rape, sodomy, or oral copulation; penetration of genital or anal openings by a foreign object; kidnapping for ransom or robbery; kidnapping with bodily harm; assault with intent to murder or attempted murder; assault with a firearm or destructive device or by means of force likely to produce great bodily injury; discharge of a firearm into an occupied building; crimes against persons who are 60 years of age or older, blind, paraplegic, or quadraplegic; use of a firearm in commission of a felony or attempt by a minor age 16 or older; any felony in which a minor age 16 or older used a weapon listed in California Penal Code section 12020(a), and burglary. *Id.* See *Review of Selected 1981 California Legislation*, 13 PAC. L.J. 513, 733 (1982) (discussing the circumstances under which juvenile proceedings are open to the public).

2. See *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 411, 589 (1984) (discussing provisions for support persons to attend criminal proceedings during testimony of a prosecuting witness 16 years of age or under).

3. CAL. PENAL CODE § 868.5(a) (specified crimes include sexual battery, rape, endangering life or health of a child, corporal punishment of a child, incest, sodomy, lewd or lascivious acts with a child under age 14, oral copulation, penetration of genital or anal openings by a foreign object, annoying or molesting children under age 18, and indecent exposure).

4. *Id.*

5. See CAL. CIV. CODE § 25 (definition of minor).

6. See CAL. WELF. & INST. CODE §§ 245-265 (jurisdiction and procedures of a juvenile court).

7. CAL. PENAL CODE § 868.5(a). See *supra* note 3 (listing the offenses that, when committed by a juvenile, trigger the victim's right to the attendance of support persons).

8. CAL. PENAL CODE § 868.5(a).

9. *Id.* § 868.5(b).

10. *Id.*

Criminal Procedure; voir dire

Penal Code § 1078 (amended).
SB 709 (Lockyer); 1987 STAT. Ch. 1211*

Under existing law, the trial court must examine prospective jurors to select a fair and impartial jury.¹ In addition, the trial court must permit reasonable oral direct examination of prospective jurors by the prosecution and counsel for the defendant.² Chapter 1211 requires the trial judge to provide a speedy, focused, and informative voir dire process and to protect prospective jurors from undue harassment, embarrassment, and inordinately extensive, repetitive, or unfocused examination.³ Chapter 1211 grants and the court discretion and control as to the form, subject matter, and duration of voir dire examination.⁴ In exercising discretion and control, the trial judge must be guided by, among other criteria, the following: (1) The nature of the charges and the potential consequences of a conviction; (2) any unique or complex elements (legal or factual) in the case; (3) the individual responses or conduct of jurors which may reveal attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case; and (4) the attorneys' need, under the circumstances, for information on which to intelligently exercise peremptory challenges.⁵ In addition, the trial court must not permit questions which the court concludes would, as their sole purpose, do any of the following: (1) Educate the jury panel to the particular facts of the case; (2) compel the jurors to commit themselves to vote in a particular way; (3) prejudice the jury; (4) argue the case; (5)

* See also p. 576.

1. CAL. PENAL CODE § 1078(a)(1).

2. *Id.* See also *People v. Helton*, 162 Cal. App. 3d 1141, 1145, 209 Cal. Rptr. 128, 130 (1984) (citing *People v. Williams*, 29 Cal. 3d 392, 407, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 324 (1981)) (counsel should be allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges, whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause). See also Comment, *Judge Conducted Voir Dire as a Time Saving Technique*, 2 RUT.-CAM. L.J. 161, 165 (1970) (counsel abuse of the opportunities afforded by the examination prompted many articles that proposed reforms designed to alleviate excessive delay in the selection of jurors by curtailing counsel's attempts to ingratiate and indoctrinate).

3. CAL. PENAL CODE § 1078(a)(2).

4. *Id.* § 1078(a)(3). The legislature intends to clarify the proper extent of voir dire examination of prospective jurors in criminal cases in order to ensure that the voir dire process is not used for improper purposes. 1987 Cal. Stat. ch. 1211, sec. 1, at ____.

5. CAL. PENAL CODE § 1078(a)(3)(i-iv).

indoctrinate the jury; (6) instruct the jury in a matter of laws; or (7) attempt to accomplish any other improper purpose.⁶

SAW

6. *Id.* § 1078(4)(i-vii). The function of the examination of prospective jurors is not to (1) educate the jury panel to the particular facts of the case; to compel the jurors to commit themselves to vote a particular way; (2) prejudice the jury for or against a particular party; (3) argue the case; (4) indoctrinate the jury; or (5) instruct the jury in matters of law. *People v. Williams*, 29 Cal. 3d 392, 408, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 325 (1981) (citing *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 882, 64 Cal. Rptr. 655, 660 (1967)). See CAL. PENAL CODE § 1078(5) (counsel is required to phrase questions in a neutral and non-argumentative form).

Criminal Procedure; threatening jurors

Penal Code § 95.1 (new).

AB 1683 (Johnston); 1987 STAT. Ch. 762

Under existing law, any person who attempts to influence the verdict or decision of a juror, person summoned as a juror, arbitrator, umpire, or referee is guilty of a felony.¹ Under Chapter 762, any person who threatens a juror in a criminal proceeding² with the intent and apparent ability to cause that juror to reasonably fear for that juror's safety, or for the safety of that juror's immediate family, is guilty of a misdemeanor.³

EAW

1. CAL. PENAL CODE § 95 (punishable by a fine not exceeding \$10,000 or by imprisonment in the state prison). Conduct that is considered corrupt consists of the following: (1) Any communication, oral or written, with the decision maker outside the regular course of proceedings; (2) any book, paper, or instrument exhibited outside the regular course of proceedings; (3) any threat, intimidation, persuasion, or entreaty; or (4) any promise or assurance of any pecuniary or other advantage. *Id.* See also *In re Tyler*, 64 Cal. 434, 1 P. 884 (1883) (tampering with a jury decision is punishable as contempt of court as well as being a criminal act).

2. CAL. PENAL CODE § 95.1.

3. *Id.*

Criminal Procedure; venue—jury selection

Penal Code § 1036.7 (new); § 1036 (amended).
SB 445 (Kopp); 1987 STAT. Ch. 780

Existing law mandates that if a defendant is incarcerated and the court orders a change of venue¹ to another county, the court must direct the sheriff to deliver the defendant to the custody of the sheriff of the other county.² Chapter 780 provides that when a change of venue is ordered and the court determines that moving the jury instead of transferring the pending action would be in the interests of the administration of justice, a change of venue may be accomplished by selecting the jury in the county or judicial district to which venue would otherwise have been transferred, and move the selected jury to the court in which the criminal action is pending.³ Chapter 780 further requires the unanimous consent of all defendants.⁴

SAW

1. See *Gray v. Central Superior Court*, 149 Cal. App. 3d 373, 375, 196 Cal. Rptr. 808, 809 (1983) (a change of venue entails removing the proceedings to another county; a transfer between districts of the same county, however, is not a change of venue). See also CAL. PENAL CODE §§ 1033, 1034 (change of venue is permitted when there is a reasonable likelihood that a fair and impartial trial cannot be held in the county or district).

2. CAL. PENAL CODE § 1036(a) (unless the court reserves jurisdiction to hear other pretrial motions).

3. *Id.* § 1036.7. If the defendant is incarcerated, and the court orders that jury selection be from the county to which the venue would otherwise have been transferred pursuant to section 1036.7, the court must direct the sheriff to deliver the defendant to the custody of the sheriff of that county. *Id.* § 1036(b).

4. *Id.* § 1036.7.

Criminal Procedure; probation—controlled substance conditions

Penal Code § 1203.1ab (new); Welfare and Institutions Code § 729.2 (new).

AB 434 (Polanco); 1987 STAT. Ch. 879

Under existing law, the court has the discretion to grant probation¹ to a person who has committed a controlled substance² violation.³ Pursuant to Chapter 879, upon conviction of any offense involving the unlawful possession, use, sale, or other furnishing of a controlled substance, and upon recommendation of the probation officer, the court must require, as a condition of probation, that the defendant not use⁴ any controlled substances, and submit to drug testing.⁵ Additionally, Chapter 879 provides that, if the defendant is subjected to drug testing and has the financial ability to pay for all or part of the testing, the court may order the defendant to pay a reasonable fee not exceeding the actual costs of testing.⁶

BAA

1. CAL. PENAL CODE § 1203(a) (probation is the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of the probation officer).

2. CAL. HEALTH & SAFETY CODE §§ 11054-11058 (list of controlled substances).

3. CAL. PENAL CODE §§ 1203.07, 1203.073, 1203.074.

4. *Id.* § 1203.1ab; *See* CAL. WELF. & INST. CODE § 729.2 (or be under the influence of).

5. CAL. PENAL CODE § 1203.1ab (unless the court makes a finding that these conditions would not serve the interests of justice); CAL. WELF. & INST. CODE § 729.9 (applies to minors as well as adults).

6. CAL. PENAL CODE § 1203.1ab; CAL. WELF. & INST. CODE § 729.9 (applies to minors as well as adults).

Criminal Procedure; probation—restitution

Penal Code § 1203.1k (new).
AB 2078 (Johnson); 1987 STAT. Ch. 890

In determining terms of probation, existing law requires a court to consider whether the defendant must make restitution to the victim or to the Restitution Fund (Fund).¹ Chapter 890, enacted in apparent response to the California Court of Appeals decision in *People v. Cervantes*,² allows either the court, or if the defendant consents, the probation officer, to determine the specific amount and the manner in which restitution will be paid to the victim.³ The defendant, however, has the right to a hearing in order to contest the amount or the manner of restitution imposed by the probation officer.⁴

PSS

1. CAL. PENAL CODE § 1203.1. See CAL. GOV'T CODE § 13967 (appropriate circumstances to impose a restitutionary fine). See *Review of Selected 1986 California Legislation*, 18 PAC. L.J. 577, 593 (1987) (restitution to victims of crimes). See also *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 567, 596 (1983) (payment of restitution). See also *Review of Selected 1977 California Legislation*, 9 PAC. L.J. 439, 463 (1978) (compensation to victims of crime). See generally Hardin, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52 (1982) (overview of restitution philosophy, procedures, and goals).

2. 154 Cal. App. 3d 353, 201 Cal. Rptr. 187 (1984). Where the defendant was required to pay restitution, in an amount and a manner to be determined by a probation officer, as a condition of probation, the applicable statute at the time defendant was sentenced did not permit the trial court to place the amount and manner of restitution within the sole discretion of the probation officer. *Id.* at 359, 201 Cal. Rptr. at 190.

3. CAL. PENAL CODE § 1203.1k (a decision to order restitution made by the court must be based on the probation officer's report).

4. *Id.* If the court orders restitution to the fund, only the court may determine the amount and the manner restitution is to be made to the fund. *Id.*

Criminal Procedure; controlled substances—forfeiture proceedings

Health and Safety Code §§ 11471.5, 11488.4, 11488.5 (new); §§ 11470, 11473.3, 11488, 11488.4, 11488.5, 11489 (amended).
AB 1076 (Condit); 1987 STAT. Ch. 924*

Under existing law, specified property,¹ including that used as a container in a controlled substance offense,² is subject to forfeiture.³ Chapter 924 clarifies existing law by providing that any real property,⁴ boat,⁵ airplane,⁶ or vehicle⁷ used in a controlled substance offense is not subject to forfeiture on the basis that the property was used as a container for specified property.⁸ Under existing law, a peace officer⁹ making an arrest for a specified controlled substance offense¹⁰

* Section 2 of Chapter 924 amending California Health and Safety Code section 11473.3 expires by limitation on January 1, 1989. Section 4 of Chapter 924 amending California Health and Safety Code section 11488.4 expires by limitation on January 1, 1989. Section 5 of Chapter 924 enacts California Health and Safety Code section 11488.4 on January 1, 1989. Section 6 of Chapter 924 amending California Health and Safety Code section 11488.5 expires by limitation on January 1, 1989. Section 7 of Chapter 924 enacts California Health and Safety Code section 11488.5 on January 1, 1989.

1. CAL. HEALTH & SAFETY CODE § 11470. Property subject to forfeiture includes: (a) Controlled substances that have been manufactured, distributed, dispensed, or acquired; (b) raw materials, products, and any equipment used in the manufacturing, processing, or delivery of any controlled substance; (c) property used as a container for property described in subdivision (a) or (b); (d) books, records, research products and materials used in conjunction with controlled substances; (e) any boat, airplane, or other vehicle used to facilitate the possession or sale of specified controlled substances; (f) moneys, negotiable instruments, securities, or other things of value furnished by any person in exchange for controlled substances; and (g) real property. *But see id.* § 11470(g) (real property is not subject to forfeiture if the property is used as a family residence or for other lawful purposes, or if the property is owned by two or more persons, with one person having no knowledge of the unlawful use).

2. *See generally id.* §§ 11350-11390 (offenses involving controlled substances).

3. *Id.* § 11470.

4. CAL. CIV. CODE § 658 (definition of real property).

5. CAL. HARB. & NAV. CODE § 21 (definition of vessel).

6. CAL. PUB. UTIL. CODE § 21012 (definition of aircraft).

7. CAL. REV. & TAX. CODE § 10702 (definition of vehicle).

8. CAL. HEALTH & SAFETY CODE § 11470(c) (specified property includes: (a) Controlled substances that have been manufactured, distributed, dispensed, or acquired; or (b) raw materials, products, and any equipment used in the manufacturing, processing, or delivery of any controlled substance). In addition to specified property, the following are subject to forfeiture: (1) All property except real property or a boat, airplane, or any vehicle used as a container for property described in subdivision (a) or (b); (2) books, records, research products and materials used in conjunction with controlled substances; (3) any boat, airplane, or other vehicle that has been used to facilitate the possession or sale of specified controlled substances; (4) all money, negotiable instruments, securities, or other things of value furnished by any person in exchange for controlled substances. *Id.* § 11470(c)-(f).

9. CAL. GOV'T CODE § 50920 (definition of peace officer).

10. CAL. HEALTH & SAFETY CODE § 11488(a). Under California Health and Safety Code section 11488(a), specified controlled substance offenses include violations of: California Health

may seize property¹¹ that the officer has probable cause to believe is subject to forfeiture.¹² All of the seized property must be turned over to the superior court and must not be transferred except on court order.¹³ Chapter 924 expands existing law by allowing a peace officer to seize any personal property subject to forfeiture.¹⁴ Chapter 924 requires the peace officer to notify the Franchise Tax Board¹⁵ of any seizures exceeding five thousand dollars in value.¹⁶

Existing law requires the Attorney General or a district attorney to file a petition for forfeiture of specified items of property seized.¹⁷ Notice of the seizure and forfeiture proceedings must be served¹⁸ upon any person who has an interest in the seized property.¹⁹ The defendant may bring a motion for the return of the property if the property was seized without a warrant²⁰ or if the property is not subject to forfeiture.²¹ Chapter 924 extends the Attorney General's or district attorney's filing to cover any items of property subject to forfeiture.²² Pursuant to Chapter 924, any person having an interest

and Safety Code sections 11351 (possession or purchase of designated controlled substances), 11351.5 (possession of cocaine for sale), 11352 (transportation, selling, administering, or giving away designated controlled substances), 11355 (sale or furnishing substances falsely represented to be a controlled substance), 11359 (possession of marijuana for sale), 11360 (transporting, selling, administering, or giving away marijuana), 11378 (possession of controlled substances for sale), 11378.5 (possession for sale of designated substances including phencyclidine), 11379 (transportation, selling, administering, or giving away designated controlled substances), 11379.5 (transportation, selling, administering, or giving away designated controlled substances including phencyclidine), 11379.6 (manufacturing, compounding, converting, or producing a controlled substance), 11382 (sale or furnishing substances falsely represented to be a controlled substance) and California Penal Code section 182 (conspiracy). *Id.*

11. CAL. HEALTH & SAFETY CODE § 11488(a); *see id.* § 11470(e)-(f) (property subject to forfeiture).

12. *Id.* § 11488(a).

13. *Id.* § 11488(b).

14. *Id.* § 11488(a); *see id.* § 11470(a)-(f) (property subject to forfeiture).

15. CAL. GOV'T CODE § 15700 (creation of Franchise Tax Board).

16. CAL. HEALTH & SAFETY CODE § 11488(a); *id.* § 11471.5 (police officer making a seizure must notify the Franchise Tax Board if the value of the property exceeds \$5,000).

17. *Id.* § 11488.4(a). Specified items of property include: (a) Any boat, airplane, or other vehicle that has been used to facilitate the possession or sale of specified controlled substances; (b) all money, negotiable instruments, securities, or other things of value furnished by any person in exchange for controlled substances; or (c) real property. *Id.* *See id.* § 11488.4(i) (the burden of proof in a forfeiture action for a vehicle, boat, or plane is beyond a reasonable doubt). *But see id.* § 11488.4(k) (when the defendant fails to appear, the showing of a prima facie case is all that is required in the action).

18. *Id.* § 11488.4(c) (by registered mail or personal service).

19. *Id.*

20. *Id.* § 11488.4(g).

21. *Id.* § 11488.4(h).

22. *Id.* § 11488.4(a); *id.* § 11470(a)-(g) (property subject to forfeiture). *See id.* § 11488.4(i)(2) (the burden of proof in a contested forfeiture action involving cash, negotiable instruments, or other cash equivalents of a value not less than \$25,000, is beyond a reasonable doubt).

in property that has not been seized, but is subject to forfeiture, must be notified of the seizure and forfeiture proceedings.²³ The defendant may bring a motion for the return of property on the basis that the warrant was improper,²⁴ or the property was not subject to forfeiture.²⁵

On January 1, 1989, Chapter 924 reenacts the limitation on property subject to forfeiture by petition of the Attorney General and the district attorney.²⁶ This reenactment does not provide for non-judicial forfeiture of property.²⁷

RMM

23. *Id.* § 11488.4(c); *id.* § 11488.5(a)(1) (persons claiming an interest in property seized may file a claim within 30 days from the date of first publication of notice if that person was not personally served or served by mail, or within 10 days after receipt of actual notice).

24. *Id.* § 11488.4(g); *see* CAL. PENAL CODE §§ 1538.5 (search or seizure with or without a warrant was unreasonable), 1539 (discovery of refusal of previous search warrant), 1540 (no probable cause).

25. CAL. HEALTH & SAFETY CODE § 11488.4(h).

26. *Id.* § 11488.4(a),(k).

27. *Compare* 1987 Cal. Stat. ch. 924, sec. 4, at ____ (allowing nonjudicial forfeiture of property with 1987 Cal. Stat. ch. 924, sec. 5, at ____ (amending CAL. HEALTH & SAFETY CODE § 11488.4) (nonjudicial forfeiture of property not provided for).

Criminal Procedure; probation—house confinement

Penal Code § 1203.li (new).

AB 1515 (Roos); 1987 STAT. Ch. 1063

Existing law authorizes a court to impose reasonable conditions of probation, which may include requiring the defendant to pay the costs of incarceration, provided the defendant has the ability to do so.¹ Chapter 1063 authorizes a court to place a defendant under house confinement² or to imprison the defendant in the county jail when the defendant is convicted of a violation of any building standards adopted by a local entity.³ Chapter 1063 further provides

1. CAL. PENAL CODE § 1203.1c(a). *See id.* § 1203.1c(b)(1)-(4) (definition of ability to pay).

2. "House confinement" means confinement to a residence or location designated by the court and specified in the probation. *Id.* § 1203.li(c).

3. *Id.* § 1203.li(a) (including but not limited to local health, fire, building, safety ordinances or resolutions, or any other ordinance or resolution relating to the health and safety of occupants of buildings).

that a defendant who has been ordered to serve a period of time under house confinement may also be ordered to pay the cost of having a guard or police officer outside the area in which the defendant has been confined.⁴

SAW

4. *Id.* § 1203.1i(b).

Criminal Procedure; bail—forfeiture

Penal Code § 1305 (amended).
SB 316 (Robins); 1987 STAT. Ch. 1081

Under existing law, if a defendant, without sufficient excuse, neglects to appear in court on any occasion when the defendant's presence is lawfully required,¹ or neglects to surrender in execution of a judgment, the court is required to enter the failure to appear into the minutes and to declare bail² forfeited.³ Chapter 1081 provides that bail will not be forfeited if within fifteen court days from arraignment a complaint is not filed or the charges have been dismissed.⁴

PLJ*

1. CAL. PENAL CODE § 1305 (for arraignment, trial, judgment, or any other required occasion).

2. *Id.* § 1305(a) (includes any money deposited instead of bail).

3. *Id.*

4. *Id.*

* The *Pacific Law Journal* wishes to acknowledge the work of Robert M. Morgester and Sara Hoover in preparing the analysis of Chapter 1081.

Criminal Procedure; motor vehicles—assault with firearm

Penal Code §§ 246.1, 12022.55 (new); § 12034 (amended).
AB 766 (M. Waters); 1987 STAT. Ch. 1147
(Effective September 26, 1987)

Prior law provided that a motor vehicle owner¹ or driver who knowingly permitted another person to carry a firearm within the vehicle or discharge the firearm from the vehicle was guilty of a misdemeanor.² Chapter 1147 reenacts prior law but specifically provides that permitting the carrying of a firearm in a vehicle remains a misdemeanor while permitting the discharge of a firearm from a vehicle is a felony.³ Furthermore, any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony.⁴ Additionally, longer prison terms are imposed for this crime than are imposed for the felony of discharging a firearm at a person in a vehicle.⁵

Chapter 1147 imposes a separate, consecutive prison term of five years, in addition to the sentence for conviction of a felony, on any person who discharges a firearm from a vehicle.⁶ Under existing law, any firearm used in the assault is deemed a nuisance and is subject to confiscation.⁷ Chapter 1147 provides for the confiscation and sale⁸

1. The vehicle owner is guilty of a misdemeanor whether or not the owner is occupying the vehicle. 1986 Cal. Stat. ch. 1430, sec. 3, at ____ (amending CAL. PENAL CODE § 12034).

2. *Id.*

3. See CAL. PENAL CODE § 12034(a), (b) (permitting the discharge of any firearm from a vehicle is punishable by imprisonment in state prison for sixteen months or two or three years).

4. *Id.* § 12034(c). Except as provided in section 3002 of the California Fish and Game Code, any person who willfully and maliciously discharges a firearm from a motor vehicle is guilty of a public offense punishable by imprisonment for not more than one year. *Id.* § 12034(d).

5. *Id.* § 12034(c) (a felony under this subsection is punishable by imprisonment in state prison for three, five, or seven years).

6. *Id.* § 12022.55 (person means one who discharges a firearm with the intent to cause great bodily injury and is convicted of a felony or attempted felony). See also *id.* § 12022.5 (two years imprisonment for use of a firearm in a felony or attempted felony).

7. *Id.* § 245(d).

8. *Id.* § 246.1(a). The vehicle must be surrendered to the county sheriff or city chief of police, who will send notice of impending disposition of the vehicle to the legal and registered owners, other than the defendant, of the vehicle. *Id.* A legal owner, who in the regular course of business sells repossessed or surrendered motor vehicles, may sell the vehicle if notice is given to the officer to whom the vehicle was surrendered. *Id.* § 246.1(b). If the legal owner does not notify the officer of the owner's intent to sell under the provisions of Penal Code section 246.1(b), the officer must offer the vehicle for sale at public auction. *Id.* § 246.1(c).

of any motor vehicle used in the commission of a crime in which the victim was assaulted or killed with a firearm discharged from a motor vehicle.⁹ Chapter 1147 is meant to deter persons from violent actions on public streets and highways and to make the shooting of motorists a serious felony offense.¹⁰

WSY

See also id. §§ 246.1(d) (disposition of proceeds of a sale), 246.1(f) (circumstances prohibiting sale of vehicle).

9. *Id.* § 246.1(a) (the vehicle may be confiscated when a person is convicted of murder, manslaughter, attempted murder, or unlawful discharge or brandishing of a firearm from or at a motor vehicle and the victim was killed, attacked, or assaulted from or in a motor vehicle by the use of a firearm on a public street or highway).

10. 1987 Cal. Stat. ch. 1147, sec. 5, at ____.

Criminal Procedure; refiling charges after dismissal

Code of Civil Procedure § 1141.105 (repealed); §§ 69605.5, 77002, 77206, 77207, 77502 (new); §§ 69103, 69104, 69105, 69106, 69582, 69585.5, 69586, 69587, 69590.7, 69591, 69592, 69593, 69594, 69595, 69598, 69599, 69600, 69608, 69610, 69613, 69614, 69615, 72602.3, 72602.4, 72602.5, 72602.12, 72602.20, 73101.5, 73562, 73702, 73951, 74131, 74341, 74661, 74691, 74781, 74831, 74901, 77001, 77200, 77201, 77202, 77301, 77400 (amended); Government Code § 77403 (repealed); §§ 74921, 77600 (new); Penal Code § 1387.1 (new); § 1078 (amended); Revenue and Taxation Code § 97.35 (new); §§ 97, 98, 11005 (amended).

SB 709 (Lockyer); 1987 STAT. Ch. 1211*

Existing law specifies when the dismissal¹ of a criminal prosecution of a felony offense is not a bar to one subsequent prosecution.² With the enactment of Chapter 1211, when a prosecution of a violent

* *See also p. 566.*

1. CAL. PENAL CODE § 1387 (dismissal means one of the following: (1) A dismissal for want of prosecution, speedy trial, or in the furtherance of justice, pursuant to California Penal Code sections 1381-1388; (2) a dismissal for failure to provide a speedy or continuous preliminary examination, pursuant to California Penal Code sections 859b, 861; (3) a dismissal for lack of proof that a public offense has been committed, pursuant to California Penal Code section 871; or (4) an order setting aside an indictment or information, pursuant to California Penal Code section 995).

2. *Id.* § 1387.

felony³ offense has had two prior dismissals, the people must be permitted one additional opportunity to refile charges if either of the prior dismissals were due solely to excusable neglect.⁴ For the purposes of Chapter 1211, excusable neglect includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses.⁵ Under Chapter 1211, however, no charges may be refiled when the conduct of the prosecution amounted to bad faith.⁶

JTH

3. *Id.* § 667.5 (violent felony means any of the following: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape as defined in California Penal Code section 261(2); (4) sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd acts on a child under 14 as defined in California Penal Code section 288; (7) any felony punishable by death or imprisonment in the state prison for life; or (8) any other felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in California Penal Code section 12022.7 on or after July 1, 1977, or as specified prior to July 1, 1977, in California Penal Code sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in California Penal Code section 12202.5).

4. *Id.* § 1387.1(a).

5. *Id.* § 1387.1(b).

6. *Id.* § 1387.1(a).

Criminal Procedure; Davis-Areias Truth in Sentencing Act

Penal Code § 1191.3 (new).

AB 1731 (Areias); 1987 STAT. Ch. 1247

Existing law permits crime victims to attend all sentencing proceedings and express their views concerning the crime, the person responsible, and the need for restitution.¹ With the enactment of the Davis-Areias Truth in Sentencing Act,² the legislature declares that

1. CAL. PENAL CODE § 1191.1. If the victim is a minor, the parent or guardian may attend the sentencing proceedings. *Id.* The probation officer must provide adequate notice to the victim of all sentencing proceedings regarding the person who committed the crime. *Id.* See generally *Review of Selected 1986 California Legislation*, 18 PAC. L.J. 433, 593 (1987) (crime victim restitution requirement).

2. Chapter 1247 is known as the Davis-Areias Truth in Sentencing Act. 1987 Cal. Stat. ch. 1247, sec. 1, at ____.

the fair and impartial administration of justice necessitates informing victims of crime that the incarcerated defendant may be eligible for presentence custody credits,³ and conduct and worktime credits.⁴ Chapter 1247 requires the court to make an oral statement at the time of sentencing or pronouncement of judgment that statutory law permits the award of conduct and worktime credits of up to one-third or one-half of the imposed sentence, that the credits are determined by the sheriff⁵ or Department of Corrections,⁶ and that credit for presentence imprisonment is calculated by the probation department.⁷

CDR

3. CAL. PENAL CODE § 4019 (defines presentence custody credits).

4. 1987 Cal. Stat. ch. 1247, sec. 2(a), at _____. The legislature has determined that victims of crime and the public are unaware that the term of sentence imposed is rarely the term of sentence the defendant actually serves. *Id.* sec. 2(b), at _____. CAL. PENAL CODE § 2933 (defines worktime and participation credits).

5. If the prisoner is held in a county jail, the sheriff determines the available credits. CAL. PENAL CODE § 1191.3(a).

6. If the prisoner is held in a state prison, the Department of Corrections determines available credits. *Id.*

7. *Id.* The probation officer must compute a general estimate of the credits to which the defendant may be entitled for previous time served and conduct or worktime credits, and inform the victim of such credits. *Id.* § 1191.3(b). This section applies only to felony convictions. *Id.* § 1191.3(c).