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Criminal Procedure

University of the Pacific; McGeorge School of Law

Criminal Procedure

Criminal Procedure; infractions—mandatory release provisions

Penal Code §853.5 (amended).

AB 2296 (McAlister); STATS 1980, Ch 238

Support: California Highway Patrol; Office of the Governor, Legal Affairs Unit

Under existing law, a person arrested for an infraction[1] may be released if the arresting officer or his or her superior determines that the person should be released and a written notice to appear is signed by the arrestee.[2] Chapter 238 requires that when a person is arrested for an infraction, the arresting officer must release the person if a driver's license or other satisfactory evidence of identity is presented and a written promise to appear is signed.[3] The arrestee may be taken into custody only upon his or her refusal to present the proper identification or to sign the promise to appear.[4] Chapter 238 provides a uniform procedure for all cases in which an infraction is involved[5] except for violations of specific Vehicle Code sections,[6] when an appearance before a magistrate is mandatory or is left to the discretion of the arresting officer.[7]

1. *See* CAL. PENAL CODE §19c (definition of infraction).
2. *See id.* §853.5. *See generally id.* §853.6 (release upon arrest for misdemeanor).
3. *See id.* §853.5.
4. *See id.*
5. *See id.*; STATE BAR OF CALIFORNIA, 1979 CONFERENCE RESOLUTION 9-6a.
6. *See* CAL. PENAL CODE §853.5; CAL. VEH. CODE §§40302 (mandatory appearance before a magistrate for (1) failure to present a driver's license, (2) refusal to sign a promise to appear, (3) demand for an immediate appearance, or (4) driving while under the influence of alcohol or drugs), 40303 (optional appearance before a magistrate for specified offenses).
7. *See* CAL. VEH. CODE §§40302, 40303.

Criminal Procedure; prosecutions

Government Code §26500 (amended); Penal Code §§853.6, 853.6a, 853.9 (amended).

SB 1890 (Rains); STATS 1980, Ch 1094

Support: California Attorneys for Criminal Justice; Department of Finance; Office of the Governor, Legal Affairs Unit

Chapter 1094 modifies the statutory procedure for filing a written notice to appear that is issued to a person arrested for a misdemeanor.[1] Prior law required that the officer preparing the notice file the duplicate notice with the magistrate specified therein.[2] Chapter 1094 now requires that the officer file the duplicate notice to appear and the underlying police report with the prosecuting attorney[3] who, in general, will be the district attorney.[4] The prosecutor then must determine, in the exercise of the discretion conferred on him or her by law,[5] whether a prosecution should be initiated.[6] The prosecuting attorney is authorized to initiate a prosecution by filing either the notice to appear or a formal complaint with the appropriate magistrate within five days of the arrest.[7] If a prosecution will not be initiated, Chapter 1094 requires the prosecutor to notify the arrested person of that decision.[8] Thus, by channeling notices to appear through the prosecuting attorney, rather than requiring direct filing with the magistrate, Chapter 1094 apparently allows greater discretion by the prosecuting attorney in the initiation of misdemeanor prosecutions.[9]

1. *Compare* CAL. PENAL CODE §853.6(e) *with* CAL. STATS. 1976, c. 270, §1, at 562.
2. *See* CAL. STATS. 1976, c. 270, §1, at 562.
3. *See* CAL. PENAL CODE §853.6(e).
4. *See* CAL. GOV'T CODE §26500. *See also* CAL. PENAL CODE §853.6(a) (requiring that the notice to appear issued to a minor arrested for a nonfelony violation of the Fish and Game Code be filed with the prosecuting attorney rather than with the juvenile court clerk or referee or the juvenile traffic officer).
5. *See* People v. Municipal Court, 27 Cal. App. 3d 193, 207, 103 Cal. Rptr. 645, 655 (1972). See note 4 *supra.*
6. *See* CAL. PENAL CODE §853.6(e).
7. *See id.*
8. *See id.*
9. *Compare id. with* CAL. STATS. 1976, c. 270, §1, at 562.

Criminal Procedure; presence of defendant at preliminary hearing, misdemeanor probable cause

Penal Code §§991, 1043.5 (new).
AB 2931 (Harris); STATS 1980, Ch 1379
Support: Attorney General of California; California District Attorneys Association; Office of the Governor, Legal Affairs Unit

Under existing law, a felony[1] or misdemeanor[2] trial may proceed in

1. *See* CAL. PENAL CODE §17(a) (definition of felony).
2. *See id.* §17(b) (definition of misdemeanor).

certain instances when the defendant is voluntarily absent;[3] however, prior to the enactment of Chapter 1379 there were no similar guidelines governing procedure at preliminary hearings when the defendant was absent.[4] Chapter 1379 provides that a preliminary hearing may continue in the defendant's absence if the hearing was commenced in the defendant's presence and either (1) the defendant has been removed from the hearing because of continued behavior so disruptive of the court that the hearing cannot be carried on when the defendant is present, or (2) the defendant is otherwise voluntarily absent from a hearing pursuant to prosecution of an offense not punishable by death.[5] The preliminary hearing may proceed for numerous purposes, including: (1) holding the defendant to answer; (2) filing an information; or (3) discharging the defendant.[6] A defendant who has been removed because of disorderly, disruptive, and disrespectful conduct may reclaim his or her right to be present by conduct consistent with the decorum and respect inherent in the concept of courts and judicial proceedings.[7] Moreover, Chapter 1379 does not limit the existing law which provides that a felony defendant may waive his or her right to be present at a preliminary hearing, by executing a written waiver in open court that is approved by the defense counsel and filed with the court, unless he or she is specifically directed by the court to be personally present.[8]

Additionally, Chapter 1379 codifies existing case law that requires a judicial determintion of probable cause[9] as a precondition to any significant pretrial restraint of liberty,[10] including instances when a defendant pleading not guilty to a misdemeanor charge is still in custody

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3. *See id.* §1043(a), (b), (c), (d). *See generally* United States v. Cureton, 396 F.2d 671, 675-76 (D.C. Cir. 1968); People v. Malloy, 41 Cal. App. 3d 944, 954, 116 Cal. Rptr. 592, 598 (1974); People v. Connolly, 36 Cal. App. 3d 379, 383-85, 111 Cal. Rptr. 409, 411-12 (1973) (felony trials continued in defendants' absences); Beasley v. Municipal Court, 32 Cal. App. 3d 1020, 1025-26, 108 Cal. Rptr. 637, 640-41 (1973) (misdemeanor trial continued in defendant's absence).

4. *See* CAL. STATS. 1980, c. 1379, §2 at — (enacting CAL. PENAL CODE §1043.5) (defendant absent at preliminary hearing). *See generally* CAL. PENAL CODE §738; B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Preliminary Examination* §132 (nature and purpose) (Supp. 1978); Comment, *Grand Jury System Modified: Hawkins v. Superior Court*, 6 W. ST. U.L. REV., 343 (1979).

5. *See* CAL. PENAL CODE §1043.5(b)(2).

6. *See id.*

7. *See id.* §1043.5(c). *See generally* People v. Cox, 81 Cal. App. 3d, Supp. 1, 146 Cal. Rptr. 724 (1978).

8. *See* CAL. PENAL CODE §§977, 1043(d), 1043.5(d); Ernst v. Municipal Court, 104 Cal. App. 3d 710, 719-20, 163 Cal. Rptr. 861, 867-68 (1980); People v. Green, 95 Cal. App. 3d 991, 1002-03, 157 Cal. Rptr. 520, 526-27 (1979).

9. *See* People v. Municipal Court, 94 Cal. App. 3d 11, 15, 155 Cal. Rptr. 543, 545 (1979); People v. Uhlemann, 9 Cal. 3d 662, 667, 511 P.2d 609, 612, 108 Cal. Rptr. 657, 660 (1973).

10. *See* Gerstein v. Pugh, 420 U.S. 103, 125 (1975). *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Probable Cause Necessary for Significant Restraint on Liberty* §114A (Supp. 1978).

at the time of arraignment.[11] At the arraignment and upon motion by the defendant or the defendant's counsel, the magistrate must immediately determine whether there is probable cause to believe that a public offense has been committed by the defendant,[12] unless the court grants a continuance for good cause not to exceed three court days.[13] To determine whether or not probable cause exists, the magistrate must consider any warrant of arrest with supporting affidavits[14] and the sworn complaint together with any additional documents or reports incorporated with this evidence by reference,[15] which if based on information and belief,[16] must contain the basis for that information.[17] The magistrate must also consider any other documents of comparable reliability.[18] After examination of these documents, if the court finds there is probable cause to believe the charged offense was committed by the defendant, the matter will be set for trial.[19] If no probable cause is found to exist, the court will dismiss the complaint and discharge the defendant.[20] A complaint may be refiled within 15 days of a dismissal; however, a second dismissal for the same offense is a bar to any further prosecution.[21]

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11. *Compare* CAL. PENAL CODE §991 *with In re* Walters, 15 Cal. 3d 738, 747, 543 P.2d 607, 614, 126 Cal. Rptr. 239, 247 (1975). *See generally* Comment, *Criminal Law—Equal Protection Requires that Defendants Indicted by a Grand Jury Be Granted a Post-Indictment Preliminary Hearing*, 19 SANTA CLARA L. REV. 1119 (1979).
12. *See* CAL. PENAL CODE §991(a).
13. *See id.* §991(b). *See generally In re* Walters, 15 Cal. 3d 738, 750, 543 P.2d 607, 616, 126 Cal. Rptr. 239, 248 (1975); 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 455, 456 (1978).
14. *See* CAL. CIV. PROC. CODE §2003 (definition of affidavit).
15. *See* CAL. PENAL CODE §991(c).
16. *See* Weathers v. Kaiser Foundation Hosp., 5 Cal. 3d 98, 106, 485 P.2d 1132, 1136-37, 95 Cal. Rptr. 516, 520-21 (1971). *See generally* 3 B. WITKIN, CALIFORNIA PROCEDURE, *Allegations on Information and Belief* §§286, 287 (2nd ed. 1971); CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §7.4 (1977).
17. *See In re* Walters, 15 Cal. 3d 738, 751, 543 P.2d 607, 616, 126 Cal. Rptr. 239, 248-49 (1975); CAL. PENAL CODE §991(c).
18. *See* CAL. PENAL CODE §991(c).
19. *See id.* §991(d).
20. *See id.*
21. *See id.* §991(e). *See generally* People v. Uhlemann, 9 Cal. 3d 662, 664, 511 P.2d 609, 610, 108 Cal. Rptr. 657, 658 (1973).

Criminal Procedure; dismissals

Penal Code §871.5 (new); §§859b, 861, 871, 1238, 1384, 1385, 1387 (amended).
AB 2383 (McVittie); STATS 1980, Ch 938

Existing law provides that a court is required to dismiss a criminal action in certain circumstances[1] and may on its own motion dismiss a case in the furtherance of justice.[2] In *People v. Peters*,[3] however, the California Supreme Court held that the term "court" for purposes of these dismissals did not include a magistrate.[4] Chapter 938 modifies the law to allow a judge *or magistrate* to make a dismissal that serves as an effective bar to further prosecution.[5]

Under existing law, if it appears that no public offense has been committed or that there is not sufficient cause to believe the defendant is guilty of a public offense, the magistrate must discharge the defendant.[6] The magistrate could not under prior law, however, dismiss the complaint.[7] Chapter 938 requires the magistrate, in this situation, to discharge the defendant *and* dismiss the complaint.[8] A dismissal by the judge or magistrate[9] for (1) failure to provide a speedy and continuous preliminary examination,[10] (2) lack of proof that a public offense has been committed,[11] or (3) other reasons in furtherance of justice,[12] always acts as a bar to further prosecution for the same offense when the defendant is charged with a misdemeanor alone;[13] but, if the defendant is charged with a felony, *or charged with a misdemeanor and a felony*,[14] an order terminating the action serves as a bar to further prosecution only if the order is dismissing the action for the second time.[15] In this latter situation, however, a dismissal does not bar further prosecution if, subsequent to the dismissal, the judge or magistrate finds substantial new evidence that the prosecution would not have found with due diligence prior to the dismissal.[16]

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1. *See* CAL. PENAL CODE §§859b (dismissal for failure to provide a speedy preliminary examination), 861 (dismissal for failure to provide a continuous preliminary examination), 871 (dismissal due to lack of sufficient cause to believe a public offense has been committed), 1387 (multiple dismissals).
2. *See id.* §1385.
3. 21 Cal. 3d 749, 581 P.2d 651, 147 Cal. Rptr. 646 (1978).
4. *See id.* at 753, 581 P.2d at 653, 147 Cal. Rptr. at 648.
5. *See* CAL. PENAL CODE §§1385, 1387.
6. *See id.* §871.
7. *See* CAL. STATS. 1851, c. 29, §163, at 230 (CAL. PENAL CODE §871 derived from CAL. STATS. 1851, enacted 1872).
8. *See* CAL. PENAL CODE §871.
9. *Compare id.* §1387 *with* CAL. STATS. 1975, c. 1069, §1, at 2615 (amending CAL. PENAL CODE §1387).
10. *See* CAL. PENAL CODE §§859b, 861.
11. *See id.* §871.
12. *See id.* §1385.
13. *See id.* §1387.
14. *Compare id. with* CAL. STATS. 1975, c. 1069, §1, at 2615.
15. *See* CAL. PENAL CODE §1387.
16. *See id.*

Currently, both the people and the defendant have the right to a speedy preliminary examination unless both waive that right or good cause for a continuance is found.[17] Moreover, the preliminary examination must occur within ten court days of the arraignment or plea, whichever is later, or the complaint must be dismissed.[18] Prior to Chapter 938, however, the preliminary examination could not be postponed beyond ten court days when the defendant was in custody unless the *defendant personally* waived the ten-day limit.[19] Chapter 938, in addition to allowing the defendant to personally waive the ten-court day limit,[20] permits a postponement beyond ten court days if the *prosecution* establishes good cause for the postponement.[21] The Chapter provides, however, that the preliminary examination must be commenced within 60 days of the arraignment or plea unless the *defendant personally* waives the 60-day time limit.[22]

Existing law also requires that the preliminary examination be completed in one continuous session unless the magistrate postpones the examination for good cause shown by affidavit.[23] Prior to Chapter 938, however, the postponement could not exceed two days at a time or six days in all unless the *defendant* moved for, or consented to, a longer delay.[24] With the enactment of Chapter 938, continuation of the preliminary examination must not be postponed beyond ten court days unless the *defendant personally* waives the right to a continuous examination[25] *or* the *prosecution* establishes good cause for a postponement.[26] The preliminary examination must not be postponed beyond 60 days from the date the motion to postpone the examination is granted unless by consent or on motion of the defendant.[27] In either a postponement or a continuance of a preliminary examination, a defendant must be released on his or her own recognizance unless charged with a capital offense when the proof is evident and the presumption great.[28]

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17. *See id.* §§859b, 1050.
18. *See id.* §859b.
19. *See* CAL. STATS. 1977, c. 1152, §1, at — (amending CAL. PENAL CODE §859b).
20. *See* CAL. PENAL CODE §859b(a).
21. *See id.* §859b(b).
22. *See id.* §859b.
23. *See id.* §861.
24. *See* CAL. STATS. 1851, c. 29, §149, at 228 (CAL. PENAL CODE §861 derived from CAL. STATS. 1851 and enacted 1872).
25. *See* CAL. PENAL CODE §861(a).
26. *See id.* §861(b).
27. *See id.* §861.
28. *See id.* §§859b(b), 861(b), 1318.

Chapter 938 also provides for an appeal of a dismissal in the event that the action is terminated by the magistrate for (1) failure to provide a speedy or continuous preliminary examination,[29] (2) lack of proof that a public offense has been committed,[30] or (3) other reasons in the furtherance of justice.[31] The prosecution may make a motion in the superior court seeking reinstatement of the complaint or a portion thereof, as well as reinstatement of the custodial status of the defendant under the same terms and conditions as when the defendant last appeared before the magistrate, if the prosecution believes that, as a matter of law, the magistrate erroneously dismissed the action.[32] This motion must be made within ten days after the dismissal and notice must be given to the defendant and the magistrate.[33] The superior court must hear and determine the motion on the basis of the proceedings that occurred before the magistrate.[34] Although the prosecution may appeal the denial of the reinstatement[35] if the court determines that the dismissal was proper, the prosecution is barred from refiling the dismissed action, or a portion thereof.[36] If the complaint is reinstated by the superior court, the magistrate must resume the proceedings within ten days after either the order directing reinstatement has been entered or the remittur has been filed in the superior court.[37] In addition, the defendant may seek review of the decision to reinstate the complaint on the ground that the defendant has been committed without sufficient cause to believe a public offense has been committed.[38]

In summary, Chapter 938 will allow a magistrate to make a dismissal which serves as an effective bar to further prosecution.[39] This apparently eliminates the problems created by the narrow interpretation of the term "court" by the California Supreme Court in *People v. Peters*.[40]

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29. *See id.* §§859b, 861, 871.5.
30. *See id.* §§871, 871.5.
31. *See id.* §§871.5, 1385.
32. *See id.* §871.5.
33. *See id.*
34. *See id.*
35. *See id.* §§871.5, 1238(a)(9).
36. *See id.* §871.5.
37. *See id.*
38. *See id.* §§871, 871.5, 995, 999a.
39. *See id.* §§859b, 861, 871, 1387.
40. *Compare id. with* People v. Peters, 21 Cal. 3d 749, 753, 581 P.2d 651, 653, 147 Cal. Rptr. 646, 648 (1978).

Criminal Procedure; court-appointed counsel

Government Code §27707 (amended); Penal Code §987 (amended).
AB 1934 (McVittie); STATS 1980, Ch 1021
Support: California Peace Officers Association; County Supervisors Association; Office of the Governor, Legal Affairs Unit

Under existing law, if the defendant in a criminal case appears for an arraignment or other criminal proceeding[1] without counsel, the court is required to inform the defendant of his or her right to counsel and to appoint a defense attorney if defendant desires and cannot afford one.[2] To assist the court in determining if a defendant is financially able to employ counsel,[3] the public defender or the court may require a defendant to file a confidential and privileged[4] financial statement under penalty of perjury.[5] Prior to the enactment of Chapter 1021, there were no similar filing requirements to aid the court in ascertaining a defendant's financial status pursuant to the court's descretionary appointment of counsel *other* than the public defender.[6] Chapter 1021 specifies that, before appointing *any* counsel, the court may now require a defendant to file a confidential and privileged financial statement for purposes of determining the defendant's financial need.[7] In addition, a financial statement filed pursuant to appointment of a public defender or private counsel is not available to the prosecution except for investigation of possible perjury based on false material in the statement, and then only after the conclusion of the proceedings for which the financial statement was submitted.[8]

1. *See generally* CAL. GOV'T CODE §§27706, 27707.
2. CAL. PENAL CODE §987. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963). *See generally* U.S. CONST. amend. VI; CAL. CONST. art. I, §14.
3. *See In re* Smiley, 66 Cal. 2d 606, 619-20, 427 P.2d 179, 187-88, 58 Cal. Rptr. 579, 587-88 (1967); Still v. Justice Court, 19 Cal. App. 3d 815, 818, 97 Cal. Rptr. 213, 214-15 (1971).
4. *See* People v. Canfield, 12 Cal. 3d 699, 704, 527 P.2d 633, 636, 117 Cal. Rptr. 81, 84 (1974).
5. *See* CAL. GOV'T CODE §27707; CAL. PENAL CODE §987(c).
6. *Compare* CAL. PENAL CODE §987 *with* CAL. GOV'T CODE §27707 *and* CAL. STATS. 1971, c. 1800, §5, at 3898 (amending CAL. PENAL CODE §987). *See generally* CAL. PENAL CODE §987.2.
7. *See* CAL. PENAL CODE §987(c).
8. *See* CAL. GOV'T CODE §27707; CAL. PENAL CODE §§987(c), 987.8.

Criminal Procedure; disqualification of prosecutor

Penal Code §1424 (new).
SB 1520 (Nejedly); STATS 1980, Ch 780

Support: California District Attorneys Association; Office of the Governor, Legal Affairs Unit

Under existing case law, a trial judge is permitted to disqualify the district attorney prosecuting a criminal trial when a conflict of interest exists that prejudices, or appears to prejudice, the attorney against the accused.[1] Incorporating this idea, Chapter 780 states that the trial court, upon a motion to disqualify, may not disqualify the district attorney unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.[2] Notice of any motion to disqualify a district attorney from prosecuting a criminal case must be served on the district attorney and the Attorney General at least ten days before the motion is heard and must state the relevant facts and the legal authorities supporting a motion.[3] In addition, the Attorney General may appear at the hearing and file a written opinion with the court on the motion to disqualify.[4] Moreover, either the district attorney or the Attorney General may appeal an order disqualifying the district attorney and the order will be stayed while any appeal is pending.[5]

1. *See* People v. Superior Court, 19 Cal. 3d 255, 269, 561 P.2d 1164, 1173, 137 Cal. Rptr. 476, 485 (1977).
2. *See* CAL. PENAL CODE §1424.
3. *See id.*
4. *See id.; cf.* 19 Cal. 3d at 270, 561 P.2d at 1174, 137 Cal. Rptr. at 486 (1977) (trial court may order Attorney General to appear and state whether the state will prosecute a criminal case after disqualification of the district attorney).
5. *See* CAL. PENAL CODE §1424.

Criminal Procedure; polygraph examinations

Penal Code §637.4 (new).

SB 1440 (Wilson); STATS 1980, Ch 880

Support: National Organization of Women; Office of the Governor, Legal Affairs Unit

Chapter 880 prohibits any state or local agency, or any employee thereof, from requiring or requesting a complaining witness in any case involving the use of force, violence, duress, menace, or threat of great bodily harm in the commission of any sex offense to submit to a poly-

graph examination as a precondition to filing an accusatory pleading.[1] This enactment is an apparent response to the routine misuse of the polygraph examination by some police departments that require the innocent victims of sexual assaults to undergo these examinations prior to filing a report of the crime, thereby tending to discourage the reporting of sex crimes.[2] In addition, Chapter 880 allows any person who is injured by a violation of this provision to bring an action against the violator for damages in the amount of $1000 or for actual damages, whichever is greater.[3]

1. *See* CAL. PENAL CODE §637.4(a).
2. *See generally* Senator Bob Wilson, Press Release, August 22, 1980.
3. *See* CAL. PENAL CODE §637.4(b).

Criminal Procedure; psychiatric examination of sexual assault victims

Penal Code §1112 (new).

SB 500 (Watson); STATS 1980, Ch 16

Support: Attorney General of California; National Organization for Women; Women in Politics

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; California Trial Lawyers Association; Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 16, the California Supreme Court sanctioned court-ordered psychiatric examinations of victims in sexual assault cases.[1] The court recognized a need for these examinations because of the evidentiary problems in a rape prosecution when there is no testimony corroborating the victim's account of the assault.[2] Chapter 16 now prohibits a trial court from ordering a psychiatric or psychological examination[3] of any prosecuting witness,[4] complaining witness,[5]

1. *See* Ballard v. Superior Court, 64 Cal. 2d 159, 176-77, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966); CAL. PENAL CODE §220. *See generally* 3A WIGMORE, EVIDENCE §924A (Chadbourn rev. 1970); Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648 (1960); O'Neale, *Court Ordered Examination in a Criminal Prosecution—Or How Many Times Must a Woman be Raped?*, 18 SANTA CLARA L. REV. 119 (1978); Comment, *Ballard Motion: Relic of the Past or Trend of the Future*, 7 SAN FERN. V.L. REV. 189 (1979); Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1959).
2. *See* 64 Cal. 2d at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313.
3. *See* B. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §§1064

or any other witness, or of the victim in a sexual assault prosecution for the purpose of assessing his or her credibility.[6] Through removal of the psychological examination procedure, which was previously limited to sexual assault prosecutions,[7] the legislature is apparently attempting to treat sexual assault victims in the same manner as victims of other crimes.[8]

(psychiatric examination of witness), 1226A (psychiatric impeachment) (2nd ed. 1966), (Supp. 1977).

4. *See* BLACK'S LAW DICTIONARY 1099 (5th ed. 1979) (definition of prosecuting witness).

5. *See* Annot., 18 A.L.R.3d 1433 (definition of complaining witness).

6. *See* CAL. PENAL CODE §1112. *See generally* CAL. EVID. CODE §780; B. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §§1208, 1211, 1223 (attack on credibility of witness) (2nd ed. 1966).

7. *See* People v. Manson, 61 Cal. App. 3d 102, 137, 132 Cal. Rptr. 265, 283-84 (1976); People v. Johnson, 38 Cal. App. 3d 1, 6-7, 112 Cal. Rptr. 834, 837 (1974).

8. *See* Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 51 (1974).

Criminal Procedure; evidentiary privilege, training for sexual assault investigations

Evidence Code §§1035, 1035.2, 1035.4, 1035.6, 1035.8, 1036, 1036.2 (new); §912 (amended); Health and Safety Code §1598.1 (amended); Penal Code §§13516, 13836, 13836.1, 13836.2, 13837 (new).

SB 862 (Robbins); STATS 1980, Ch 917

Support: Department of Health Services; National Organization of Women; Office of the Governor, Legal Affairs Unit

Opposition: Board of Medical Quality Assurance; California Attorneys for Criminal Justice

California statutory provisions provide an evidentiary privilege for confidential communications between lawyer and client,[1] husband and wife,[2] physician and patient,[3] clergyman and penitent,[4] and psychotherapist and patient.[5] Chapter 917 creates an additional privilege for the sexual assault counselor-victim relationship.[6] In addition, Chapter 917 provides for the implementation of sexual assault investigation

1. *See* CAL. EVID. CODE §§950-962.

2. *See id.* §§970-987.

3. *See id.* §§990-1007.

4. *See id.* §§1030-1034.

5. *See id.* §§1010-1028.

6. *Compare id.* §912 *with* CAL. STATS. 1965, c. 299, §2, at 1323 (enacting CAL. EVID. CODE §912). *See generally* CAL. EVID. CODE §§1035-1036.2.

training.[7]

The sexual assault counselor-victim privilege created by Chapter 917 is subject to existing provisions of the Evidence Code regarding waiver of the privilege and protected disclosures.[8] The privilege applies only to confidential communications[9] which include any information transmitted between the victim[10] and the sexual assault counselor[11] in the course of their relationship by a means which, so far as the victim is aware, discloses the information to no third persons other than those persons necessary to further the interests of the victim.[12] The term includes all information and opinions regarding the victim's sexual conduct or reputation in sexual matters.[13] The term, however, does not include advice given by the counselor on potential testimony in court or information received by the counselor which constitutes *relevant evidence* of the alleged sexual assault[14] which is the subject of a criminal proceeding.[15]

The counselor must claim the privilege whenever he or she is present when the confidential communication is sought to be disclosed and when authorized to claim it.[16] The counselor, however, cannot claim the privilege if there is no holder of the privilege in existence or if otherwise instructed by a person authorized to permit disclosure.[17] The victim has the privilege of refusing to disclose, and of preventing another from disclosing, a confidential communication between the victim and his or her counselor if the privilege is claimed by (1) the holder of the privilege,[18] (2) any person authorized by the holder of the privilege to claim that privilege,[19] or (3) the person who was the counselor at the time of the confidential communication.[20] The victim's guardian or conservator, or the personal representative of the victim if the victim is dead, may also be a holder of the privilege.[21]

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7. *See generally* CAL. PENAL CODE §§13516(c), 13836.
8. *See* CAL. EVID. CODE §912.
9. *See id.* §§1035.4, 1035.8.
10. *See id.* §1035 (definition of victim).
11. *See id.* §1035.2 (definition of, and qualifications to become, sexual assault victim counselor).
12. *See id.* §1035.4.
13. *Id.*
14. *See id.* §1036 (definition of sexual assault).
15. *Id.*
16. *Id.* §§1035.8(c), 1036.
17. *Id.* §1035.8(c).
18. *See id.* §1035.8(a).
19. *See id.* §1035.8(b).
20. *See id.* §1035.8(c).
21. *See id.* §1035.6(b), (c).

Additionally, Chapter 917 outlines a procedure to be followed in the event of a dispute regarding what qualifies as a confidential communication.[22] The defendant may make a written motion to the court stating that he or she can offer proof of the relevancy of evidence of prior inconsistent statements for the purpose of impeachment, or proof of evidence regarding lack of any element of the offense charged.[23] The motion must be accompanied by an affidavit in which the offer of proof is stated.[24] Upon a finding that the offer is sufficient, the court must order a hearing out of the presence of the jury, if any, to allow questioning of the counselor.[25] If the court finds that any evidence offered by the defendant regarding the sexual conduct of the victim is relevant,[26] and does not exercise its discretion to exclude the evidence,[27] the court may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted.[28] The defendant may then offer evidence pursuant to the order of the court.[29]

Finally, Chapter 917 also provides for the following: (1) the establishment of an advisory committee to determine the standards and services which rape crisis centers must maintain to receive state funding and to develop a course of training for district attorneys regarding the investigation and prosecution of sexual assault cases;[30] and (2) the requirement that all officers assigned as sexual assault investigations specialists successfully complete a training program within six months of assignment.[31]

In summary, Chapter 917 creates an evidentiary privilege for the sexual assault counselor-victim relationship.[32] It also increases training for sexual assault investigations[33] in an attempt to implement the legislature's expressly declared intent of encouraging the establishment of sex crime investigation units in police agencies and in district attorneys' offices throughout the state.[34]

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22. *See id.* §1035.4.
23. *See id.* §1035.4(1).
24. *See id.* §1035.4(2).
25. *See id.* §1035.4(3).
26. *See id.* §1035.4(4). *See also id.* §780.
27. *See id.* §1035.4(4). *See also id.* §352.
28. *Id.* §1035.4(4).
29. *Id.*
30. *See* CAL. PENAL CODE §13836 (course will include training in the unique emotional trauma experienced by victims of sexual assaults). *See generally* CAL. HEALTH & SAFETY CODE §1598.1; CAL. PENAL CODE §13837.
31. *See* CAL. PENAL CODE §13516 (course must include police response to, and treatment of, victims of sexual assault).
32. *See* CAL. EVID. CODE §912. *See generally id.* §§1035-1036.2.
33. *See generally* CAL. PENAL CODE §§13516, 13836.
34. *See id.* §§13516(d), 13836.

COMMENT

The evidentiary privilege created by Chapter 917 extends only to confidential communications between the sexual assault counselor and the victim.[35] Chapter 917, however, specifically excludes from the definition of confidential communication any information received by the sexual assault counselor which constitutes *relevant evidence* of the facts and circumstances involving an alleged sexual assault.[36] Chapter 917 also allows the defendant to make a motion for purposes of impeachment or to prove that any element of an offense charged is not present.[37] If the evidence offered is deemed relevant,[38] the privilege may not be invoked.[39] Moreover, when the offer of proof relates to the sexual conduct of the victim, Chapter 917 provides that the offer must be both relevant *and* admissible; however, there is no further express limitation on the offer if it is for the purpose of showing lack of an element of the offense due to the consent of the victim.[40] Section 1103 of the Evidence Code provides that evidence of specific instances of the witness' sexual conduct may not be admissible by the defendant in order to prove consent by the complaining witness.[41] Viewed in conjunction with the specific reference to Sections 780 and 352 of the Evidence Code,[42] the failure of Chapter 917 to specify compliance with Section 1103 raises the possibility that any evidence of sexual conduct introduced under Chapter 917 is admissible so long as it satisfies the *general* requirements of admissibility and relevancy.[43]

35. *See* CAL. EVID. CODE §§1035.4, 1035.8.
36. *See id.* §1035.4.
37. *See id.* §1035.4(1).
38. *See id.* §210 (definition of relevant evidence).
39. *See id.* §1035.4.
40. *See id.* §1035.4(4). *See also id.* §§352, 780, 782, 1103(2).
41. *See id.* §1103(2).
42. *See id.* §1035.4(4).
43. *See id.* §1035.4(1), (4).

Criminal Procedure; disclosure of medical records

Penal Code Chapter 3.5 (commencing with §1542) (new); Welfare and Institutions Code §5328.01 (new).
SB 410 (Roberti); STATS 1980, Ch 1061
Support: Attorney General of California; California District Attorneys Association; Office of the Governor, Legal Affairs Unit
(*Effective September 25, 1980*)

SB 1975 (Keene); STATS 1980, Ch 1080
Support: Department of Industrial Relations; Office of the Governor, Legal Affairs Unit

Existing law requires a special master[1] to be appointed before the records held by a physician[2] or a psychotherapist[3] are disclosed to a magistrate.[4] In addition, records held by state medical facilities[5] cannot be disseminated to governmental law enforcement agencies unless the information is needed to protect federal and state elective constitutional officers and their families.[6] Chapter 1061 now permits a law enforcement agency, in some circumstances, to examine records in the possession or control of a state medical facility relating to a patient who has been confined (1) as a mentally disordered sex offender,[7] (2) as not guilty by reason of insanity,[8] or (3) pending a determination of the patient's competence to stand trial[9] (hereinafter referred to as records of criminal patients). Chapter 1080 provides procedures for disclosure to law enforcement agencies[10] of records held by health care facilities[11] regarding any patient when the records are not privileged records required to be secured by the special master procedure[12] or required by law to be confidential.[13]

To obtain records held by a health care facility *or* a state medical facility, a law enforcement agency must have the prior written consent of the patient,[14] or a court order based upon a showing of good cause and issued by a court of competent jurisdiction in the county where the

1. *See* CAL. PENAL CODE §1524(d) (definition of special master).
2. *See* CAL. EVID. CODE §990 (definition of physician).
3. *See id.* §1010 (definition of psychotherapist).
4. *See* CAL. PENAL CODE §§1523, 1524(c)-(f). *See generally* 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 440 (1980).
5. *See* CAL. WELF. & INST. CODE §5328. *See generally* CAL. HEALTH & SAFETY CODE §§1502 (definition of community care facility), 1250 (definition of health facility); CAL. WELF. & INST. CODE §§4100, 4401, 4440 (definition of state mental hospitals), 7100 (definition of county mental hospital).
6. *See* CAL. WELF. & INST. CODE §5328(g).
7. *See id.* §5328.01. *See generally* CAL. PENAL CODE §290(j) (definition of mentally disordered sex offender).
8. *See* CAL. WELF. & INST. CODE §5328.01. *See generally* CAL. PENAL CODE §1026 (insanity plea).
9. *See* CAL. WELF. & INST. CODE §5328.01. *See generally* CAL. PENAL CODE §1368 (mental competence).
10. *See* CAL. PENAL CODE §1545(b) (law enforcement agency defined as the Attorney General, every district attorney, and every state agency expressly authorized by statute to investigate or prosecute law violators).
11. *See id.* §1545(a) (health care facility defined as any licensed clinic, health dispensary, health facility, mental hospital, drug abuse clinic, or detoxification center).
12. *See generally id.* §1524.
13. *See id.* §1543(a). *See, e.g.*, CAL. HEALTH & SAFETY CODE §§11879 (disclosure of identity of methadone treatment patients), 11977 (disclosure of identity of narcotic or drug abuse patients).
14. *See* CAL. PENAL CODE §1543(a)(1); CAL. WELF. & INST. CODE §5328.01(a).

records are located.[15] In assessing good cause for the order, the court must: (1) weigh the public interest and the need for disclosure against the injury to the patient, the physician-patient relationship, and the treatment services;[16] and (2) find a reasonable likelihood that the records will disclose material information or evidence of substantial value in connection with the prosecution or investigation.[17] Additionally, a court may issue a search warrant for general medical records held by a health care facility.[18] However, before a law enforcement agency may obtain records from a state medical facility pertaining to a criminal patient, a court of competent jurisdiction must determine that the crime involves the causing of, or direct threatening of, the loss of life or serious bodily injury.[19] When granting or denying a subpoena giving the records to the agency, the court must state on the record the reasons for the decision and the facts that the court considered in making the decision.[20] Further, the law enforcement agency specifically must describe the records being sought.[21]

A law enforcement agency requesting access to general medical records must give the health care facility notice of the application for disclosure and afford the health care facility an opportunity to appear and be heard.[22] This notice may be delayed for 30 days if the law enforcement agency obtains an extraordinary order.[23] A law enforcement agency applying for disclosure of a criminal patient's records may obtain an extraordinary order to compel the state medical facility to produce the records immediately.[24] In both cases the court will grant an extraordinary order upon a showing of good cause to believe that the investigation would be seriously impeded by failure to obtain immediate disclosure of the records.[25] A law enforcement agency that has requested records pertaining to a criminal patient may obtain copies only of the original records if the patient is currently receiving treatment at the state medical facility.[26] Once the investigation or prosecution is complete, the law enforcement agency must return the records, and any copies made, to the state medical facility except for those portions

15. *See* CAL. PENAL CODE §1543(a)(2); CAL. WELF. & INST. CODE §5328.01(b).
16. *See* CAL. PENAL CODE §1543(a)(2)(A); CAL. WELF. & INST. CODE §5328.01(b)(1).
17. *See* CAL. PENAL CODE §1543(a)(2)(B); CAL. WELF. & INST. CODE §5328.01(b)(2).
18. *See* CAL. PENAL CODE §1543(a)(3). *See generally id.* §1524; B. WITKIN, CALIFORNIA EVIDENCE, *Exclusion of Illegally Obtained Evidence* §§121-143 (2d ed. 1966), (Supp. 1977).
19. *See* CAL. WELF. & INST. CODE §5328.01(b)(3).
20. *See id.* §5328.01(b)(4).
21. *See id.* §5328.01(b).
22. *See* CAL. PENAL CODE §1543(c).
23. *See id.* §§1543(c), 1544.
24. *See* CAL. WELF. & INST. CODE §5328.01(c).
25. *See* CAL. PENAL CODE §§1543(c), 1544; CAL. WELF. & INST. CODE §5328.01(c).
26. *See* CAL. WELF. & INST. CODE §5328.01(e).

made a part of the court record.[27] Further, Chapters 1061 and 1080 require the court to make sure that the information obtained from the records is not disclosed unnecessarily or disseminated,[28] thereby assuring that the patient's right of privacy is protected.[29] Willful dissemination of information contained in records of a criminal patient held by a state medical facility is a misdemeanor unless the dissemination relates to the criminal investigation for which the records were obtained;[30] however, no similar criminal violation is provided for under the terms of Chapter 1080 that control access to general medical records.[31] Moreover, Chapter 1080 does not apply to investigations of Medi-Cal benefits fraud, to investigations of insurance fraud performed by the Department of Insurance or by the California Highway Patrol, or to investigations or research regarding health and safety performed by, or under agreement with, the Department of Industrial Relations.[32] Disclosure by a medical facility or medical provider of information contained in medical records also is not prohibited when disclosure is mandated by statute or regulation.[33] The provisions of Chapter 1061 that control access to records of a criminal patient will be repealed on January 1, 1983, unless a later statute deletes or extends the date.[34]

27. *See id.* §5328.01(b)(6).
28. *See* CAL. PENAL CODE §1543(d); CAL. WELF. & INST. CODE §5328.01(b)(5).
29. *See generally* Division of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (1979).
30. *See* CAL. WELF. & INST. CODE §5328.01(d).
31. *See* CAL. PENAL CODE §1543.
32. *See id.* §1543(d).
33. *See id.* §1543(e).
34. *See* CAL. WELF. & INST. CODE §5328.01.

Criminal Procedure; driving violations—prior convictions

Vehicle Code §23102.4 (new).

AB 1935 (McVittie); STATS 1980, Ch 468

Support: Department of Finance; Office of the Governor, Legal Affairs Unit

Opposition: Department of Motor Vehicles

Existing law provides for the enhancement of a sentence for conviction of driving under the influence of liquor or drugs, or driving with a revoked or suspended license, when the defendant is charged with a

previous conviction of the same offense.[1] A defendant may always challenge the previous conviction on constitutional grounds precedent to its use for enhancement purposes[2] and, under prior law, the constitutionality of the previous conviction was subject to relitigation in *any* subsequent prosecution for driving under the influence of liquor or drugs.[3]

Chapter 468 revises the law to provide that when a hearing on the constitutionality of a prior conviction has been held, a judicial determination that the conviction is constitutional bars a constitutional attack in a later prosecution in which the same prior conviction is charged.[4] Chapter 468 does not preclude this challenge, however, if at a later time a subsequent statute or appellate court decision having retroactive application affords a new ground for constitutional challenge.[5] Moreover, a determination that a prior conviction is unconstitutional precludes the allegation or use of the prior conviction in any judicial or administrative proceeding, and the Department of Motor Vehicles must strike the prior conviction from its records.[6]

1. *See* CAL. VEH. CODE §§14601(b), (c), 23102(d), (e), (f), (g).
2. *See* Thomas v. Department of Motor Vehicles, 3 Cal. 3d 335, 338-39, 475 P.2d 858, 859-61, 90 Cal. Rptr. 586, 587-89 (1970); People v. Coffey, 67 Cal. 2d 204, 214-15, 430 P.2d 15, 22, 60 Cal. Rptr. 457, 464 (1967); *In re* Rogers, 102 Cal. App. 3d 61, 66, 162 Cal. Rptr. 230, 232 (1980); CAL. VEH. CODE §23102.2. *Cf. In re* Streeter, 66 Cal. 2d 47, 50-51, 423 P.2d 976, 977-78, 56 Cal. Rptr. 824, 826 (1967) (concerning reference to prior convictions in term-fixing or parole); People v. Cota, 98 Cal. App. 3d 211, 215-16, 159 Cal. Rptr. 401, 403-04 (1979) (relating to possession of concealable firearms).
3. *See* People v. Allheim, 48 Cal. App. 3d Supp. 1, 6, 121 Cal. Rptr. 448, 451 (1975); CAL. VEH. CODE §23102.2(b)(5). *See also* Gonzalez v. Municipal Court, 32 Cal. App. 3d 706, 711-12, 108 Cal. Rptr. 612, 617 (1973).
4. *See* CAL. VEH. CODE §23102.4.
5. *See id.*
6. *See id.*

Criminal Procedure; continuance after surprise alibi

Penal Code §1051 (new).
AB 3199 (Fenton); STATS 1980, Ch 551
Support: Attorney General of California; Office of the Governor, Legal Affairs Unit

Existing law provides that a continuance in a criminal trial will be granted only upon a showing of good cause.[1] The granting of a contin-

1. *See* CAL. PENAL CODE §1050.

uance is within the discretion of the trial judge[2] and, apart from a narrow exception for mandatory continuances,[3] there are no statutory grounds for a continuance.[4] With the enactment of Chapter 551, there is good cause for a reasonable continuance in a criminal trial if a witness other than the defendant testifies regarding an alibi defense, unless the court finds that the prosecutor was, or with due diligence should have been, aware of this evidence.[5] Chapter 551, by affording the prosecution in a criminal trial the statutory right to a continuance if confronted with a surprise alibi defense,[6] apparently provides a statutory codification of existing trial procedure.[7]

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2. *See* People v. Farley, 267 Cal. App. 2d 214, 221, 72 Cal. Rptr. 855, 860 (1968); People v. Manson, 183 Cal. App. 2d 168, 173, 6 Cal. Rptr. 649, 652 (1960).
3. *See* CAL. PENAL CODE §1050. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §286 (1963) (grounds for continuance).
4. *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §278 (1963), (Supp. 1978) (grounds for continuance).
5. *See* CAL. PENAL CODE §1051.
6. *Compare id.* §1050 *with id.* §1051.
7. *See* Williams v. Florida, 399 U.S. 78, 85-86 (1970); *See generally* Reynolds v. Superior Court, 12 Cal. 3d 834, 839-40, 528 P.2d 45, 48, 117 Cal. Rptr. 437, 440 (1974); Fedeli, Jr., *The Alibi Witness Rule: Sewing Up the "Hip Pocket" Defense*, 11 SANTA CLARA LAWYER 155, 159 (1970-71); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 247-48 (1964).

Criminal Procedure; prison terms

Business and Professions Code §7522 (amended); Health and Safety Code §§8325, 12401 (amended); Penal Code §§243.2, 243.4, 245.2, 245.4, 830.10, 830.11, 830.31, 830.35, 830.36, 830.5a, 830.7 (repealed); 830.10, 830.31, 830.7, 830.8 (new); 241, 243, 245, 273.5, 273a, 273d, 830.1, 830.2, 830.3, 830.4, 830.5, 830.6, 831, 832.4, 1026.5, 1170, 1170.1, 1203.01, 1203.2a, 2900, 3041.5, 3042, 3421, 4011.7, 4016.5, 4131.5, 4133, 4852.03, 4852.16, 5002, 5055, 12027, 12031, 12420, 13012 (amended); Vehicle Code §§165.3, 165.4, 22657.5, 22659 (repealed); 165, 1808.4, 2416, 22651, 22653, 22654, 22655, 22656, 22702 (amended); Welfare and Institutions Code §5328.02 (new); §§240, 1721, 1802, 5008 (amended).

SB 1877 (Presley); STATS 1980, Ch 1117

Support: Department of Finance; Department of the Youth Authority; Office of the Governor

SB 1447 (Presley); STATS 1980, Ch 1340

(*Effective September 30, 1980*)

Support: Department of Finance; Commission on Police Officer Standards and Training; Office of the Governor, Legal Affairs Unit

Chapter 1117 establishes new procedures for determining the period of rehabilitation that a convicted felon must serve prior to receiving a certificate of rehabilitation and pardon.[1] Moreover, Chapter 1117 provides for determinate sentencing for certain crimes that previously were punished by indeterminate prison terms,[2] and additionally designates the jurisdiction where the terms of imprisonment will be served when a person committed to the Director of Corrections (hereinafter referred to as the Director) is subsequently committed to a penal or correctional institution in another jurisdiction.[3] Further, Chapter 1117 clarifies the parole procedures practiced by both the Youthful Offender Parole Board and the Board of Prison Terms.[4]

Period of Rehabilitation

Currently, any person convicted of a felony[5] who has been released after completion of his or her prison term or who is on parole, may petition the superior court for a certificate of rehabilitation pardon.[6] To receive this certificate, the petitioner must serve a *period of rehabilitation*[7] that includes a mandatory three-year state residency requirement.[8] Under prior law, in addition to the mandatory three-year residency requirement, the period of rehabilitation was determined by adding 30 days for every year of the mandated statutory prison term and a proportional number of days for every part of a year prescribed by statute.[9] With the enactment of Chapter 1117, the additional period of rehabilitation determined with reference to the 30-day formula has been deleted.[10] Instead, Chapter 1117 provides that the period of rehabilitation will be the mandatory three-year residency requirement *plus four years* for persons convicted of the following crimes:[11] (1) mur-

1. *See generally* CAL. PENAL CODE §4852.03.
2. *See generally* CAL. HEALTH & SAFETY CODE §12401; CAL. PENAL CODE §§273.5, 273a, 273d, 4011.7, 4131.5, 4133, 12420.
3. *See generally* CAL. PENAL CODE §2900.
4. *See generally id.* §§3041.5, 3042, 5002(e); CAL. WELF. & INST. CODE §§1721, 1802.
5. *But see* CAL. PENAL CODE §4852.01(d).
6. *See id.* §4852.01. *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crime* §1112(a) (1963).
7. *See* CAL. PENAL CODE §§4852.06, 4852.13. *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crime* §1112(a) (1963).
8. *See* CAL. PENAL CODE §4852.03.
9. *See* CAL. STATS. 1976, c. 434, §3, at 1111 (amending CAL. PENAL CODE §4852.03). *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crime* §1112(b) (1963).
10. *Compare* CAL. PENAL CODE §4852.03 *with* CAL. STATS. 1976, c. 434, §3, at 1111.
11. *See* CAL. PENAL CODE §4852.03(1).

der;[12] (2) kidnapping;[13] (3) wrecking or derailing a train;[14] (4) assault by a life prisoner with a means of force likely to cause great bodily harm;[15] (5) unlawful explosion of a destructive device causing death, mayhem, or great bodily injury;[16] (6) sabotage of articles or preparations for war or defense;[17] or (7) any other offense that carries a life sentence.[18] Moreover, for any person who committed an offense that is not included in this list, the period of rehabilitation is now *two years* in addition to the mandatory three years of residency.[19]

Existing law provides that a term of imprisonment starts running on the actual delivery of the defendant into the custody of the Director at the place designated by the Director for the reception of convicted felons.[20] Chapter 1117 provides a further qualification to existing law by requiring that the place of reception be an institution under the jurisdiction of the Director.[21]

Term of Imprisonment and Determinate Sentencing

When a person committed to the Director is subsequently committed to a penal or correctional institution in another jurisdiction, Chapter 1117 provides that the Director must designate the institution in the other jurisdiction as the place for reception and service of the California term if (1) the subsequent commitment is ordered to be served concurrently with the California commitment, (2) the prisoner is placed in a penal or correctional institution of the other jurisdiction, and (3) the prisoner is not received by the Director.[22] Moreover, while under existing law time served in an institution designated by the Director will be credited as service of the term of imprisonment,[23] Chapter 1117 states that any time during which the prisoner is deemed an escapee will not be credited as service of the prison term.[24]

In addition to provisions concerning the term of imprisonment, Chapter 1117 provides for determinate prison sentencing for certain crimes not originally covered by the Uniform Determinate Sentencing

12. *See id.* §187.
13. *See id.* §209.
14. *See id.* §219.
15. *See id.* §4500.
16. *See id.* §12310.
17. *See* MIL. & VET. Code §1672.
18. *See* CAL. PENAL CODE §4852.03(1).
19. *See id.* §4852.03(2).
20. *See id.* §2900(a).
21. *Compare id.* §2900 *with* CAL. STATS. 1963, c. 1856, §1, at 3832.
22. *See* CAL. PENAL CODE §2900(b)(3).
23. *See id.* §2900(c).
24. *See id.* §2900(a), (c)(2).

Act.[25] Specifically, the following crimes now carry a determinate prison term of 16 months or two or three years:[26] (1) escape from a hospital by force or violence by a person arrested for, charged with, or convicted of a misdemeanor;[27] (2) battery by a confinee of one institution upon a person not confined in that institution;[28] (3) escape or attempted escape from an industrial farm;[29] (4) sale, possession, or transportation of tear gas;[30] and (5) the knowing, unlawful possession of an explosive.[31] In addition, persons found guilty of spouse beating,[32] willful cruelty or unjustifiable punishment of a child,[33] or willful infliction of cruel or inhuman corporal punishment or injury upon a child[34] will receive a sentence of two, three, or four years.[35] Chapter 1117 further allows the trial court, prior to sentencing a person, to request information from the Board of Prison Terms concerning the sentences of other persons convicted of similar crimes under similar circumstances in California.[36]

Furthermore, Chapter 1346 changes the penalty imposed for battery against a peace officer[37] or fire fighter.[38] Under prior law, when a battery[39] was committed against a peace officer or fire fighter and the person committing the offense knew, or reasonably should have known, that the officer or fire fighter was engaged in the performance of his or her duties, the crime was punishable by up to a year in the county jail, or by 16 months or two or three years in the state prison.[40] Chapter 1346 changes the punishment for such a battery to a fine of no more than $1000, up to a year in the county jail, or both.[41] Chapter 1346 further provides that if the peace officer or fire fighter sustains any in-

25. *See* CAL. HEALTH & SAFETY CODE §12401; CAL. PENAL CODE §§273.5, 273a, 273d, 4011.7, 4131.5, 4133, 12420. *See generally* CAL. STATS. 1976, c. 1139, at 5061 (enacting the Uniform Determinate Sentencing Act); 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 282 (1977).

26. *See* CAL. PENAL CODE §18. *Compare id. with* CAL. HEALTH & SAFETY CODE §12401 *and* CAL. PENAL CODE §§4011.7, 4131.5, 4133, 12420.

27. *See* CAL. PENAL CODE §4011.7.

28. *See id.* §4131.5.

29. *See id.* §4133.

30. *See id.* §12420.

31. *See* CAL. HEALTH & SAFETY CODE §§12305, 12401.

32. *See* CAL. PENAL CODE §273.5.

33. *See id.* §273a.

34. *See id.* §273d.

35. *See id.* §§273.5, 273a, 273d.

36. *See id.* §1170(g).

37. *See id.* §§830-832.7 (definition of peace officer).

38. *See id.* §245.1 (definition of fireman); MERRIAM-WEBSTER NEW INT'L DICTIONARY 855 (3d ed.) (definition of fireman, fire fighter). *See generally* CAL. PENAL CODE §243.

39. *See generally* 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against the Person* §§255, 258, 259, 278 (1963), (Supp. 1975), (Supp. 1978), §277A (Supp. 1978).

40. *See* CAL. STATS. 1976, c. 1139, §150.5, at 5105 (amending CAL. PENAL CODE §243).

41. *See* CAL. PENAL CODE §243.

jury during the commission of the battery, the punishment is to be a fine of up to $1000, or imprisonment for up to a year in the county jail, or imprisonment for 16 months or two or three years in the state prison.[42] Chapter 1346 defines "injury" as any physical injury that requires professional medical treatment.[43]

Chapter 1117 makes a further change in the Uniform Determinate Sentencing Act.[44] Under the Act, any person convicted of two or more felony offenses may not receive a term of imprisonment that exceeds double the middle term of the offense providing the most severe punishment, although some exceptions are provided.[45] With the enactment of Chapter 1117, a defendant who is convicted of felony escape from an institution in which he or she is lawfully confined is also excepted from this sentencing provision and therefore may be sentenced to more than double the period of the base term.[46]

Youthful Offender Parole Board and Board of Prison Terms

Chapter 1117 reduces from five to four the number of members of the Youthful Offender Parole Board required to be present to exercise the Board's functions.[47] Under existing law, when a youthful offender is required by law to be discharged, but the Youthful Offender Parole Board determines that release of that person would be physically dangerous to the public, the Board may apply to the committing court for an order for the continued detention of the youthful offender.[48] This order extends the control of the Youth Authority over the youthful offender; however, unless the youthful offender is previously discharged, Chapter 1117 states that the Youthful Offender Parole Board, in regard to persons committed after conviction in criminal proceedings, must file an application for continued detention within two years after the extension if continued detention is determined to be necessary.[49] Prior law provided for a five-year period before an application for continued detention was required.[50]

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42. *See id.*
43. *See id.*
44. *See generally id.* §§1170(b), 1170.1(f). *Compare id. with* CAL. STATS. 1976, c. 1139, §273, at 5140.
45. *See* People v. Wright, 92 Cal. App. 3d 811, 812-13, 154 Cal. Rptr. 926, 926-27 (1979); People v. Rosalez, 89 Cal. App. 3d 789, 793, 153 Cal. Rptr. 65, 67 (1979). See note 44 *supra.*
46. *See* CAL. PENAL CODE §1170.1(f).
47. *Compare* CAL. WELF. & INST. CODE §1721(a) *with* CAL. STATS. 1979, c. 860, §17, at —. *See generally* CAL. WELF. & INST. CODE §§1716-1726, 1737.1, 1754, 1765, 1766, 1767.5, 1800-1803.
48. *See* CAL. WELF. & INST. CODE §§1769-1771, 1780.
49. *See id.* §§1800, 1802.
50. *See* CAL. STATS. 1979, c. 860, §37, at — (enacting CAL. WELF. & INST. CODE §1802).

The Board of Prison Terms, like the Youthful Offender Parole Board, has authority with respect to parole procedures.[51] Under existing law, when the Board acts to postpone a previously set parole date, the prisoner affected has a right to a review of the action.[52] Under prior law, that review was required to occur within 90 days of notice of the postponement being received by the prisoner; Chapter 1117 now deletes the time limitation within which this review must take place.[53] Prior to the enactment of Chapter 1117, specific procedures delineated when the Board of Prison Terms was to meet to consider the parole suitability of, or the setting or advancing of a parole date for, any life prisoner.[54] Chapter 1117 provides that these procedures no longer apply when the Board is meeting to consider advancing the prisoner's parole date due to the prisoner's conduct since his or her last hearing.[55] Further, Chapter 1117 vests all powers and duties of the Board of Prison Terms and Paroles, and the Advisory Pardon Board, in the Board of Prison Terms,[56] whereas previously these powers and duties were vested in the Department of Corrections.[57] Moreover, notwithstanding the existing law that makes all records obtained from voluntary or involuntary patients at a mental health care facility confidential unless there is a specified exception,[58] Chapter 1117 also provides that these records will be disclosed, as necessary to the administration of justice, to the Youth Authority and Adult Correctional Agency, or any component thereof.[59]

51. *See generally* CAL. PENAL CODE §§5075-5082; CAL. WELF. & INST. CODE §§1752-1776.
52. *See* CAL. PENAL CODE §3041.5(b)(3).
53. *Compare id. with* CAL. STATS. 1979, c. 255, §20, at —.
54. *See* CAL. STATS. 1979, c. 255, §22, at — (amending CAL. PENAL CODE §3042). *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crime* §1096 (1963), (Supp. 1975), (Supp. 1978), §1091E (Supp. 1978).
55. *See* CAL. PENAL CODE §3042(e).
56. *See id.* §5002(e). *See generally id.* §§5075-5082.
57. *See* CAL. STATS. 1979, c. 255, §44, at — (amending CAL. PENAL CODE §5002). *See generally* CAL. PENAL CODE §§5000-5008, 5011; 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crime* §898 (1963), (Supp. 1975), (Supp. 1978).
58. *See* CAL. WELF. & INST. CODE §5328.
59. *See id.* §5328.02.

Criminal Procedure; misdemeanors—infractions, reductions

Penal Code §17 (amended, repealed, and reenacted); §19e (new and repealed).
AB 1813 (Kapiloff); STATS 1980, Ch 1270

Support: California Highway Patrol; California Judges Association; Department of Motor Vehicles; Office of the Governor, Legal Affairs Unit
Opposition: California Attorneys for Criminal Justice; California District Attorneys Association

Existing law permits a magistrate to reduce a felony charge to a misdemeanor at or before the preliminary examination[1] or prior to ordering a defendant to answer.[2] Prior to the enactment of Chapter 1270, however, no comparable provisions existed for reducing misdemeanors to infractions.[3] Chapter 1270 now allows the court or the prosecutor to reduce certain misdemeanor charges[4] to infractions.[5]

Specifically, the prosecutor may file a complaint charging the defendant with an infraction unless the defendant, after being informed of his or her rights, elects to have the case proceed as a misdemeanor.[6] In addition, the court may decide that the offense is an infraction.[7] If the court so determines, and the defendant consents, the case must proceed as if the defendant had been arraigned on an infraction complaint.[8] A conviction for an infraction, which has been reduced from a misdemeanor, is not grounds for suspending, revoking, or denying any license, nor grounds for revoking probation or parole.[9] The provisions of Chapter 1270 are repealed on January 1, 1986, and the law will revert to its pre-1981 status.[10]

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1. *See* CAL. PENAL CODE §17(b)(5). *See generally* Esteybar v. Municipal Court, 5 Cal. 3d 119, 95 Cal. Rptr. 524, 485 P.2d 1140 (1971); Malone v. Superior Court, 47 Cal. App. 3d 313, 120 Cal. Rptr. 851 (1975); Larson v. Municipal Court, 41 Cal. App. 3d 360, 116 Cal. Rptr. 1 (1974); B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Proceeding before Trial* §146A (Supp. 1978).
2. *See* CAL. PENAL CODE §§17(b)(5), 872 (order holding a defendant to answer).
3. *See* CAL. STATS. 1976, c. 1070, §1, at 4809 (amending Cal. Penal Code §17).
4. *See* CAL. PENAL CODE §19e. The following crimes may be reduced: CAL. BUS. & PROF. CODE §§25658(b) (sale of liquor to minors), 25661 (use of false identification by minors for purchase of liquor); CAL. PENAL CODE §§330 (gaming), 415 (fighting or disturbance by loud noises or offensive words that are likely to provoke immediate violent reactions), CAL. VEH. CODE §§27150.1 (sale of defective exhaust systems), 40508 (failure to make timely appearance in court after promising to do so), 42005 (violation of a court order to attend traffic school).
5. *See* CAL. PENAL CODE §17(d). *See generally id.* §19c (definition of infraction).
6. *See id.* §17(d)(1).
7. *See id.* §17(d)(2).
8. *See id.*
9. *See id.* §19e.
10. *See* CAL. STATS. 1980, c. 1270, §5, at —.

Criminal Procedure; violent felonies—enhancement of sentence

Penal Code §1170.1 (amended); §1203.08 (amended and renumbered).
AB 2123 (Boatwright); STATS 1980, Ch 132
(*Effective May 28, 1980*)
Support: Board of Prison Terms; Department of Corrections; Office of the Governor, Legal Affairs Unit

Chapter 132 has been enacted to clarify and reemphasize the legislative intent behind the 1977 revisions of the Uniform Determinate Sentencing Act.[1] Under existing law, when a person is convicted of two or more felonies, the length of that person's prison term may be enhanced[2] only when the consecutive offense is a specified violent felony.[3] In *People v. Harvey*,[4] the California Supreme Court held that the use of a firearm[5] was not an offense included within the requisite statutory definition of "violent felonies".[6] The court reasoned that allowing an enhancement for use of a firearm in any case involving firearms would render the statutory reference to *specified* violent felonies unnecessary.[7] The court extended this holding to also suggest that the infliction of great bodily injury[8] was not a statutory violent felony for purposes of enhancement.[9]

With the enactment of Chapter 132, the use of a firearm or the infliction of great bodily injury is now included within the list of violent felonies considered for the imposition of enhancements with a subordinate prison term.[10] In addition, Chapter 132 provides corresponding changes in other sections of the Penal Code to highlight the inclusion of firearm use and infliction of great bodily injury within the list of specified violent felonies.[11]

1. *See* CAL. STATS. 1980, c. 132, §§1, 4, at —. *See also* People v. Harvey, 25 Cal. 3d 754, 761, 602 P.2d 396, 400, 159 Cal. Rptr. 696, 700 (1979) (inaccurate statement of legislative intent behind 1977 revision of Section 667.5(c)(8) of the Penal Code). *See generally* CAL. PENAL CODE §667.5(c)(8); B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crime* §1025L (Supp. 1978) (aggregate and consecutive terms for multiple convictions); 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 469 (1978).
2. *See* CAL. PENAL CODE §1170.1(a). *See generally* 25 Cal. 3d at 759-61, 602 P.2d at 399-400, 159 Cal. Rptr. at 699-700.
3. *See* CAL. PENAL CODE §667.5(c) (definition of violent felony).
4. 25 Cal. 3d 754, 602 P.2d 396, 159 Cal. Rptr. 696 (1979).
5. *See* CAL. PENAL CODE §667.5(c)(8). *See generally id.* §12022.7.
6. *See* 25 Cal. 3d at 761, 602 P.2d at 400, 159 Cal. Rptr. at 700. *But see* CAL. PENAL CODE §667.6(c)(8).
7. *See* 25 Cal. 3d at 761, 602 P.2d at 400, 159 Cal. Rptr. at 700.
8. *See* CAL. PENAL CODE §667.5(c)(8). *See generally id.* §§254, 12022.5.
9. *See* 25 Cal. 3d at 761, 602 P.2d at 400, 159 Cal. Rptr. at 700.
10. *See* CAL. PENAL CODE §1170.1(a).
11. *See id.* §§1170.1(f), 1203.085(a), (b).

Criminal Procedure; residential burglary—denial of probation

Penal Code §462 (new).
SB 1236 (Beverly); STATS 1980, Ch 42
Opposition: Department of Finance; Office of the Governor, Legal Affairs Unit

In an apparent effort to discourage residential burglaries,[1] Chapter 42 temporarily[2] augments existing provisions regarding probation[3] by denying probation to any person convicted of a burglary in the nighttime[4] or of a felony burglary in the daytime[5] except in unusual cases[6] when the interests of justice would best be served by granting probation.[7] In addition, upon conviction of a misdemeanor daytime burglary of a residence,[8] Chapter 42 requires confinement in the county jail for not less than 90 days nor more than one year except in unusual cases when in the interests of justice probation may still be granted.[9] Chapter 42 further provides that if probation is granted, the court must specify the reason for that order on the court record.[10]

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1. Assemblywoman Sally Tanner, Newsletter, March 13, 1980.
2. *See* CAL. STATS. 1980, c. 42, §4, at — (effective Jan. 1, 1981, through Jan. 1, 1983, unless deleted or extended).
3. *See, e.g.*, CAL. PENAL CODE §§1203.06(a)(1)(vi), 1203.06(a)(2), 1203.075(a), (b), 1203.08(a), 1203.09 (denial of probation following conviction of subsequent felony, including second degree burglary, while armed with a firearm). *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, *Persons Ineligible for Probation or Suspension of Sentence* §§1056B-1056F (Supp. 1978).
4. *See* CAL. PENAL CODE §§460(1), 461(1), 463. *See generally id.* §459; CAL. VEH. CODE §635.
5. *See* CAL. PENAL CODE §§460(2), 461(2).
6. *See* People v. Wilson, 34 Cal. App. 3d 524, 527, 110 Cal. Rptr. 104, 106 (1973) (discussion of unusual cases).
7. *See* CAL. PENAL CODE §462(a). *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, *Persons for Whom Probation is Disfavored* §1050A, *Exception: Interests of Justice* §1056A (Supp. 1978).
8. *See* CAL. PENAL CODE §§459, 460(1).
9. *Compare id.* §462(b) *with id.* §1203(d).
10. *See id.* §462(b).

Criminal Procedure; sealing and destruction of arrest records

Penal Code §851.8 (repealed); §§851.8, 851.85 (new).
AB 2861 (Hannigan); STATS 1980, Ch 1172
(Effective September 29, 1980)

Support: Department of Finance; Office of the Governor, Legal Affairs Unit

In conjunction with existing statutory provisions,[1] Chapter 1172 establishes new procedures that allow any person who has been arrested to petition a law enforcement agency for the sealing and destruction of his or her arrest records[2] if no accusatory pleading has been filed.[3] A copy of the petition will be served on the district attorney in the county having jurisdiction over the offense.[4] Upon a determination by the law enforcement agency that the arrested person is factually innocent,[5] the agency, with the concurrence of the district attorney, will seal the arrest records and petition for three years, and thereafter will destroy them[6] in accordance with standard procedures.[7] The law enforcement agency additionally must instruct any other local, state, or federal agency with a record of the arrest to seal and destroy that record.[8] If the law enforcement agency and the district attorney fail to respond to the petition by accepting or denying the petition within 60 days of either the running of the relevant statute of limitations or of receipt of the petition if the statute of limitations has already run, the petition is deemed to be denied.[9]

When a petition is denied, the arrestee may petition the municipal or justice court with territorial jurisdiction in the case to hold an evidentiary hearing for the purposes of determining factual innocence.[10] The burden of proof originally rests with the petitioner to show that there was *no reasonable cause* to believe that he or she committed the offense for which the arrest was made;[11] if the petitioner meets this burden of proof, the burden then shifts to the respondent who may introduce any material, reliable, and relevant evidence to show that *reasonable cause exists* to believe that the petitioner committed the offense for which he

1. *See* CAL. HEALTH & SAFETY CODE §11361.5 (records destroyed in certain marijuana-related offenses); CAL. PENAL CODE §§851.7, 1203.45; CAL. WELF. & INST. CODE §781 (records sealed in certain cases involving minors). *See generally* CAL. PENAL CODE §851.85.

2. *See* CAL. PENAL CODE §851.8. *See generally* Spivey, *Right of Exonerated Arrestee to have Fingerprints, Photographs, or other Criminal Identification or Arrest Records Expunged or Restricted*, 46 A.L.R.3d 900 (1972); Comment, *The Rights of the Innocent Arrestee: Sealing of Records Under California Penal Code* §851.8, 28 HASTINGS L.J. 1463 (1977).

3. *See* CAL. PENAL CODE §851.8(a).

4. *Id.*

5. *See* People v. Glimps, 92 Cal. App. 3d 315, 322, 155 Cal. Rptr. 230, 235 (1979) (interpreting factual innocence).

6. *See* CAL. PENAL CODE §851.8(a).

7. *See id.* §851.8.

8. *See id.* §851.8(a).

9. *See id.* §851.8(b).

10. *See id.*

11. *See id.*

or she was arrested.[12] The court, when ruling on the issue of factual innocence, must find that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made,[13] and if the court so finds, it will direct the sealing and destruction of arrest records according to the prescribed procedures.[14]

When a person has been arrested and an accusatory pleading has been filed, but no conviction has occurred,[15] at any time after dismissal of the action, the defendant may ask the court that dismissed the action for a finding that the defendant is factually innocent.[16] If it is so found, the court may, with the concurrence of the district attorney, order the records sealed.[17] The presiding judge at the trial also may grant this relief if the defendant is acquitted of the charge and appears to the judge to be factually innocent.[18] In addition, the relief provided by Chapter 1172 is available for an arrest deemed to be, or described as, a detention,[19] but not for any offense categorized as an infraction.[20]

In presenting the evidence that the court will use to determine factual innocence, the district attorney may present any relevant, material, and reliable evidence, apparently, even if the evidence has been illegally seized.[21] However, if no previous evidentiary hearing or trial occurred, the district attorney apparently may use any evidence in a hearing to determine factual innocence, even if it was illegally seized.[22] In response to the possible use of illegally seized evidence at a hearing to determine factual innocence, Chapter 1172 contains a provision that automatically repeals those provisions that permit a person to petition for sealing and destruction of arrest records upon the effective date of a final court ruling under the United States or California Constitution preventing any illegally seized evidence from being used to determine factual innocence.[23] If this occurs, that portion of Chapter 1172 that

12. *See id.*
13. *See id.*
14. *See id.* §851.8(b).
15. *See id.* §851.8(c), (d).
16. *See id.*
17. *See id.*
18. *See id.* §851.8(e).
19. *See id.* §851.8(m). *See also id.* §§849(b), (c) (situations when arrest is deemed to be a detention), 849.5 (record of release of detention), 851.6(a), (b) (certificate describing detention).
20. *See id.* §851.8(n). *See generally* Letter from Thomas Hannigan to Governor Edmund G. Brown Jr., September 4, 1980 (copy on file at *Pacific Law Journal*).
21. *See* CAL. PENAL CODE §851.8(b). *Compare id. with id.* §1538.5(d). *See generally* People v. Bellici, 24 Cal. 3d 879, 598 P.2d 473, 157 Cal. Rptr. 503 (1979); People v. Glimps, 92 Cal. App. 3d 315, 155 Cal. Rptr. 230 (1979).
22. *See* 24 Cal. 3d at 888, 598 P.2d at 479-80, 157 Cal. Rptr. at 509-10.
23. *See* CAL. PENAL CODE §851.8(o). *See generally* Letter from Anthony L. Dicce to James Zupancic, May 14, 1980 (copy on file at *Pacific Law Journal*).

contains existing law will become operative.[24]

An arrestee who is declared to be factually innocent will be issued a written declaration of exoneration, after which the arrest will be treated for all purposes as if it had never occurred,[25] and all pertinent records and police reports will bear the notation "exonerated" whenever reference is made to the arrestee.[26] Specific procedures are suggested for the permanent destruction and sealing of the arrest records[27] and for the notification of the petitioner.[28] However, no records may be destroyed until the resolution of any civil action that the arrestee or a codefendant has filed against the officers or agency making the arrest, and the sealed records may be opened in that action.[29] Any finding of factual innocence, however, is inadmissible as evidence in *any* future action.[30] Further, the arrestee has until January 1, 1983, to file a petition for relief for arrests occurring up to five years before September 29, 1980.[31] In conclusion, the legislature has developed a plan to allow factually innocent persons the opportunity to have their arrest records sealed and destroyed.[32]

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24. *See* CAL. STATS. 1980, c. 1172, §4, at —. *Compare* CAL. PENAL CODE §851.85 *with* CAL. STATS. 1975, c. 904, §1, at 2002 (amending CAL. PENAL CODE §851.8).
25. *See* CAL. PENAL CODE §851.8(f).
26. *See id.* §851.8(h).
27. *See id.* §851.8(j).
28. *See id.* §851.8(f), (h).
29. *See id.* §851.8(k). *See generally* Letter from Thomas Hannigan to Governor Edmund G. Brown Jr., September 4, 1980 (copy on file at *Pacific Law Journal*).
30. *See* CAL. PENAL CODE §851.8(i).
31. *See id.* §851.8(l); CAL. STATS. 1980, c. 1172, §6, at —.
32. *See* CAL. STATS. 1980, c. 1172, §6, at —.

Criminal Procedure; mental health-commitment of criminal defendants

Penal Code §§1026.1, 1370.3, 1374 (repealed); §§1026.1, 1026.3, 1370.3, 1370.4, 1374, 11105.1 (new); §§1026, 1026.2, 1026.5, 1367, 1370, 1370.1, 1370.2, 1372, 1375.5, 4029 (amended); Welfare and Institutions Code §§6317, 6325.1, 7375 (repealed); §§6325.1, 6325.3, 7375 (new); §§6316, 6325, 6327 (amended).

AB 2751 (Nolan); STATS 1980, Ch 547

Support: Department of Finance; Department of Mental Health; Office of the Governor, Legal Affairs Unit

Chapter 547 was enacted in an apparent attempt to revise and combine provisions governing the outpatient status of mentally disordered sex offenders,[1] defendants found not guilty by reason of insanity,[2] and developmentally disabled offenders.[3] Under existing law, when a defendant pleads not guilty by reason of insanity and the verdict or finding shows that the defendant was insane at the time the offense was committed and that sanity has not been recovered, the court will direct the defendant to be confined in a state hospital[4] or other appropriate public or private treatment facility, or to be placed on outpatient status.[5] With the enactment of Chapter 547, direct outpatient status is also provided for mentally disordered sex offenders and developmentally disabled defendants as an alternative to commitment in a treatment facility.[6]

Specifically, Chapter 547 provides for direct outpatient status, except when the person is charged with specified felonies,[7] and for transfer to outpatient status from a treatment facility commitment[8] if the following conditions are met: (1) the defendant will not be a danger to the health and safety of others while on outpatient status, and specified officials determine that he or she will benefit from outpatient status;[9] (2) the county mental health director is able to identify an appropriate program of supervision and treatment;[10] and (3) after specified notice and a hearing, the court specifically approves the recommendation and plan for outpatient status.[11] If the person is charged with, or convicted of, any of the specified felonies,[12] outpatient status is not available until that person actually has been confined in a treatment facility for at least 90 days after having been committed as an insane person, developmentally disabled offender, or a mentally disordered sex offender,[13] and outpatient status is subject to conditions similar to

1. *See* CAL. WELF. & INST. CODE §6300 (definition of mentally disordered sex offender).
2. *See* CAL. PENAL CODE §1026.
3. *See id.* §§1367, 1370.1(a)(1) (definition of developmentally disabled offender). *See generally id.* §§1600-1614.
4. *See* CAL. WELF. & INST. CODE §4001 (definition of state hospital).
5. *See* CAL. PENAL CODE §1026(a).
6. *See id.* §§1370(a), 1370.4, 1600; CAL. WELF. & INST. CODE §6316(a)(1).
7. *See* CAL. PENAL CODE §1601 (including murder, mayhem, kidnapping when great bodily injury is intentionally inflicted on the victim, robbery with a deadly or dangerous weapon or when the victim suffers greater bodily harm, and any felony involving or posing a serious threat of death or great bodily injury to another person). *See generally id.* §§1026, 1370(a)(1); CAL. WELF. & INST. CODE §6316(a)(1).
8. *See* CAL. PENAL CODE §§1026.3, 1370.3; CAL. WELF. & INST. CODE §6325.3.
9. *See* CAL. PENAL CODE §1602(a).
10. *See id.* §1602(b).
11. *See id.* §1602(c).
12. See note 7 *supra.*
13. *See* CAL. PENAL CODE §§1026, 1370, 1370.1, 1370.4, 1600, 1601(a), 1603; CAL. WELF. & INST. CODE §§6316, 6321.

those required for granting direct outpatient status.[14] In addition, Chapter 547 specifies that in these cases (1) the recommendation for outpatient status must be forwarded by the court to the county mental health director, the prosecutor, and the defense counsel,[15] (2) the proposed plan for outpatient supervision and treatment must be forwarded by the court to the prosecutor and the defense counsel,[16] and (3) the court, within 15 judicial days of receipt of the proposed plan, must set the matter for hearing and give notice to specified parties.[17] If the hearing results in approval of the recommendations for outpatient status of insane defendants or mentally disordered sex offenders, the county mental health director or his or her designee will be the outpatient supervisor and is therefore responsible for reporting to the court on the status and progress of the defendant at 90 day intervals.[18] Chapter 547 imposes an additional condition to be met prior to the approval of any recommendation regarding a developmentally disabled offender.[19] These persons cannot be committed to a treatment facility or granted outpatient status without first being evaluated at a regional center.[20] In addition, the outpatient supervisor will be appointed by the person in charge of the regional center.[21] In no event may the outpatient status exceed one year, regardless of the underlying mental condition of the person.[22] At the end of the one-year period, the court must conduct a hearing that results in the discharge of the person from commitment, an order to confine the person in a treatment facility, or the renewal of the outpatient status.[23]

A hearing regarding the revocation of outpatient status is required if at any time during the outpatient period (1) the supervisor believes that the person requires extended *inpatient* treatment or if the person refuses to accept further outpatient treatment,[24] or (2) the prosecutor believes that the person is a danger to the health and safety of others.[25] Chapter 547 requires that notice of the hearing be given to specified

14. *Compare* CAL. PENAL CODE §1603 *with id.* §1602.
15. *See id.* §1604(a). *See generally id.* §1603(a).
16. *See id.* §1604(b). *See generally id.* §1603(b).
17. *See id.* §1604(c) (prosecutor, defense counsel, county mental health director, and director of treatment facility).
18. *See id.* §1605.
19. *See id.* §§1370.4, 1600. *See generally id.* §1370.1.
20. *See id.* §1370(a)(2); CAL. WELF. & INST. CODE §§4620-4628 (definition of regional centers).
21. *See* CAL. PENAL CODE §1370.4.
22. *See id.* §1606.
23. *See id.*
24. *See id.* §1608.
25. *See id.* §1609.

parties[26] and allows for the confinement of the patient in a treatment facility pending the outcome of the hearing.[27] Finally, a hearing is required if the supervisor believes that the person has regained competence to stand trial, is no longer insane, or is no longer a mentally disordered sex offender.[28] Upon an affirmative finding, the court proceedings against the person may be resumed.[29]

Chapter 547 provides that, if a county does not have an appropriate program for outpatient supervision and treatment,[30] or the county refuses to assume treatment responsibility, the court may order parole treatment, not to exceed one year, for persons who have been committed to a treatment facility pursuant to a plea of insanity.[31] The person, however, must have been confined in the facility for at least 90 days[32] and must have improved to the extent that he or she is no longer a danger to the health and safety of others and will benefit from parole.[33] If the treatment is denied, no further recommendations for parole can be made within six months of the previous recommendation.[34] If parole treatment is granted, periodic progress and status reports must be submitted by the parole supervisor and the medical director of the treatment facility.[35] The parole treatment is subject to revocation if the person fails to meet the conditions of parole, requires extended inpatient treatment, or refuses to accept parole supervision.[36] In summary, Chapter 547 provides for direct outpatient status in specified cases and establishes standardized procedures for granting, supervising, and terminating outpatient status, regardless of the underlying mental condition of the defendant.[37]

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26. *See id.* §§1608, 1609 (outpatient, county mental health director, and attorney of record for the outpatient).
27. *See id.* §§1608, 1609 (body attachment), 1610 (if the person is confined, he or she is entitled to judicial review and an explanation of rights).
28. *See id.* §1607.
29. *See id.* §§1026.2 (no hearing can be held until 90 days have elapsed from order committing a person to treatment facility or granting outpatient status), 1372, 1607; CAL. WELF. & INST. CODE §6325.
30. *See generally* CAL. PENAL CODE §§1602(b), 1603(b).
31. *See id.* §§1026, 1611.
32. *See id.* §1611(a) (period of confinement must have been at least three years if the offense charged was punishable by death).
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.* §1611(b).
37. *See generally id.* §§1600-1614.

Criminal Procedure; determinate length of commitment of narcotics addicts

Welfare and Institutions Code §§3051, 3052, 3102, 3106, 3109, 3155, 3200, 3201 (amended).
SB 1878 (Presley); STATS 1980, Ch 822
(*Effective July 29, 1980*)
Support: California Attorneys for Criminal Justice; California Peace Officers Association

Existing law provides that a person convicted of any crime, except those specifically listed,[1] may be involuntarily committed to a narcotics rehabilitation center if he or she is addicted, or is in imminent danger of becoming addicted, to narcotics.[2] A person is not eligible for commitment if the judge deems that person unfit because of excessive criminality.[3] In addition, the Director of Corrections may later exercise his or her power to discharge a person if relevant circumstances indicate that the person is not a fit subject for treatment.[4] With the enactment of Chapter 822, a person subject to civil commitment[5] generally may not be confined under a drug addiction program longer than he or she would otherwise have been confined under a criminal conviction.[6]

Under existing law the judge is required to adjourn the proceedings and request the district attorney to file a petition for commitment if it appears, upon conviction, that the defendant is an addict or is in imminent danger of becoming an addict.[7] Prior to the enactment of Chapter 822, if the written report of the examining physicians and the findings of the judge at a subsequent hearing confirmed the defendant's addiction, the judge was required to order commitment whether or not sen-

1. *See* CAL. WELF. & INST. CODE §3052.
2. *See id.* §§3050-3052. *See generally* 2 B. WITKIN, CALIFORNIA CRIMES, *Civil Commitment of Addicts* §682 (Supp. 1978); Belton, *Civil Commitment of Narcotic Addicts in California: A Case History of Statutory Construction*, 19 HASTINGS L.J. 603 (1968).
3. *See* People v. Wagoner, 89 Cal. App. 3d 605, 615-16, 152 Cal. Rptr. 639, 645-46 (1979); People v. Flower, 62 Cal. App. 3d 904, 911-12, 133 Cal. Rptr. 455, 458-59 (1976); People v. Leonard, 25 Cal. App. 3d 1131, 1136-37, 102 Cal. Rptr. 435, 439 (1972); CAL. WELF. & INST. CODE §3051.
4. *See* People v. Toscano, 69 Cal. App. 3d 140, 159, 137 Cal. Rptr. 893, 905 (1977); People v. Munoz, 51 Cal. App. 3d 559, 564-65, 124 Cal. Rptr. 322, 326-27 (1975); People v. Blackwell, 45 Cal. App. 3d 804, 811-12, 119 Cal. Rptr. 768, 773 (1975); CAL. WELF. & INST. CODE §§3053, 3109.
5. *See* People v. Hernandez, 96 Cal. App. 3d 856, 861, 158 Cal. Rptr. 434, 437 (1979); People v. Toscano, 69 Cal. App. 3d 140, 147-49, 137 Cal. Rptr. 893, 896-98 (1977). *See generally* CAL. WELF. & INST. CODE §§3100-3111.
6. *See* CAL. WELF. & INST. CODE §§3051, 3109(c), 3200(b), 3201(c). *But see In re* Werden, 76 Cal. App. 3d 79, 80-81, 142 Cal. Rptr. 622, 623 (1977); People v. Gray, 65 Cal. App. 3d 220, 225, 135 Cal. Rptr. 206, 208, 209 (1976).
7. *See* People v. Nicholson, 64 Cal. App. 3d Supp. 31, 35, 134 Cal. Rptr. 623, 625 (1977); CAL. WELF. & INST. CODE §3051. *See generally* CAL. WELF. & INST. CODE §§3102, 3106.

tence had been imposed.[8] This commitment could have been for up to seven years with a possible three-year extension.[9] In some cases a person could be returned from the rehabilitation center to serve additional time in prison even if he or she had spent time under the rehabilitation program equal to the maximum sentence for his or her particular crime.[10] Chapter 822 provides that, before commencing commitment procedures, the court must impose a specific sentence on the defendant and suspend its execution.[11] If the person sentenced is not admitted to the rehabilitation program because of a medical determination of nonaddiction,[12] a judicial determination of unsuitability,[13] or is later discharged,[14] that person is to be returned immediately[15] to the court for execution of the suspended sentence.[16] In each instance, the court may use its discretion to modify the sentence, dismiss the criminal charges, or suspend further proceedings as warranted in the interests of justice.[17] Currently, if a defendant is convicted of one of certain specified felonies,[18] he or she is ineligible for commitment to the rehabilitation program except in unusual cases.[19] Chapter 822 expands the list of specified felonies that mandate ineligibility to include (1) forcible sex offenses,[20] (2) arson,[21] (3) recklessly causing fires,[22] (4) causing great bodily harm,[23] (5) any crime that has either an enhancement or no probation provision for use of a firearm,[24] or an enhancement provision for the taking, damaging, or destruction of property exceeding $25,000,[25] or (6) a conviction which results in a sentence exceeding six years exclusive of any credit for good behavior.[26]

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8. *See* CAL. STATS. 1979, c. 359, §1, at — (amending CAL. WELF. & INST. CODE §3051).
9. *See* CAL. STATS. 1965, c. 1226, §2, at 3071 (amending CAL. WELF. & INST. CODE §3201).
10. *See* People v. Gray, 65 Cal. App. 3d 220, 225, 135 Cal. Rptr. 206, 208, 209 (1976); CAL. STATS. 1965, c. 1226, §2, at 3071.
11. *See* CAL. WELF. & INST. CODE §3051.
12. *See id.*
13. *See id.*
14. *See id.* §§3109(c), 3200(b), 3201(c).
15. *Compare id. with* People v. Gray, 65 Cal. App. 3d 220, 223-24, 135 Cal. Rptr. 206, 208 (1976) (two-year gap).
16. *See* CAL. WELF. & INST. CODE §§3051, 3109(c), 3201(c).
17. *See id.* §§3051, 3109(c), 3200(b), 3201(c).
18. *See id.* §3052.
19. *See* People v. Morales, 49 Cal. App. 3d 732, 736-37, 122 Cal. Rptr. 804, 806; CAL. WELF. & INST. CODE §3052(h).
20. *See* CAL. PENAL CODE §1203.06.
21. *See id.* §451.
22. *See id.* §452.
23. *See id.* §§12022.7, 12022.8.
24. *See id.* §1203.06.
25. *See id.* §12022.6.
26. *See* CAL. WELF. & INST. CODE §3052. *Compare id. with* CAL. STATS. 1976, c. 1079, §96, at 4891. *See generally* CAL. PENAL CODE §2931 (reduction of term for good behavior and participation).

Under Chapter 822, a person involuntarily committed pursuant to a felony conviction is given credit for time spent in confinement.[27] When the person has accumulated time equal to the sentence imposed, he or she is returned to court and the sentence is deemed to have been served in full, subject to the possibility of a parole period for anti-narcotic testing.[28] The maximum terms for commitment following misdemeanor offenses are shortened from a possible ten years to 16 months, and for noncriminal convictions from two and one-half years to one year.[29] The noncriminal commitment maximum applies to persons within the rehabilitation program prior to July 29, 1980, as well as to those persons subsequently committed.[30]

Persons on outpatient status from a drug rehabilitation center who abstain from the use of narcotics other than medically prescribed methadone for a specified time may be discharged from the program.[31] Chapter 822 shortens required abstinence periods for outpatients (1) under noncriminal commitments from two years to six months[32] and (2) for outpatients under criminal commitments from three years to one year if the suspended sentence is two years or less, and from three years to 16 months if the sentence is for more than two years.[33] If the person is discharged from the rehabilitation center and subsequently remains in custody under execution of the suspended sentence, time served during commitment is credited to the sentence imposed.[34] A person committed to state prison upon release from the rehabilitation program, however, is no longer eligible for a $200 rehabilitation payment.[35]

Following the enactment of California's Determinate Sentencing Act, the number of felon addicts committed to the rehabilitation program decreased.[36] In an effort to serve the shortest possible time, addicts frequently would choose a prison term with possibility of parole rather than the lengthy seven year commitment.[37] By shortening the total commitment period and required abstinence time, Chapter 822

27. *See* CAL. WELF. & INST. CODE §3201(c).
28. *Compare id. with* CAL. STATS. 1965, c. 1226, §2, at 3071.
29. *Compare* CAL. WELF. & INST. CODE §3201(a), (b) *with* CAL. STATS. 1965, c. 1226, §2, at 3071.
30. *See* CAL. STATS. 1980, c. 822, §9, at —.
31. *See* CAL. WELF. & INST. CODE §3200.
32. *See id.* §3200(a).
33. *See id.* §3200(b).
34. *See id.* §3201(c).
35. *Compare id.* §3155 *with* CAL. STATS. 1973, c. 1006, §2, at 2001.
36. *See* CAL. DEPT. OF CORRECTIONS TASK FORCE STUDY: STUDY OF THE CIVIL ADDICT IN RELATIONSHIP TO THE DETERMINATE SENTENCING LAW, 1 (1979).
37. *See id.* at 2.

may make commitment a more viable possibility for addict offenders.[38] Additionally, Chapter 822 brings the California Rehabilitation Center program into conformance with the Determinate Sentencing Act and other civil commitments.[39] Furthermore, the legislature has specified that the new determinate commitment provisions only apply prospectively to persons who commit crimes on or after July 29, 1980.[40] The California Supreme Court ruled in *In re Kapperman*,[41] however, that the state may not arbitrarily classify persons for purposes of confinement credit benefits without some legitimate public interest; otherwise an equal protection violation will result.[42] If the prospective limitation is found to be violative of equal protection under the California and United States Constitutions,[43] a reviewing court may later strike the impermissible limitation portion of the statute and extend the credit procedures to *all* persons within the California Rehabilitation Center program.[44] Application of the determinate commitment periods to persons already committed might then shorten remaining time in custody for some addicts.[45]

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38. *See id.*

39. *See* CAL. PENAL CODE §11709(a); CAL. WELF. & INST. CODE §5008.1; CAL. STATS. 1980, c. 822, §10, at —. *See generally* 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 282 (1977); Cassou, Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5 (1978).

40. *See* CAL. STATS. 1980, c. 822, §9, at —.

41. 11 Cal. 3d 542, 522 P.2d 657, 114 Cal. Rptr. 97.

42. *See id.* at 548-50, 522 P.2d at 661-62, 114 Cal. Rptr. at 101-02. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 515 (1978).

43. *See* U.S. CONST. amend. XIV; CAL. CONST. art. 1, §7.

44. *See In re* Kapperman, 11 Cal. 3d 542, 550, 522 P.2d 657, 662, 114 Cal. Rptr. 97, 102 (1975).

45. *See id.*