RESOLUTION 04-01-2019

DIGEST

Statute of Limitations: Issuance of Summons

Amends Penal Code section 804 to include the issuance of a summons as an action that commences prosecution.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 804, to read as follows:

§804

Except as otherwise provided in this chapter, for the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs:

(a) An indictment or information is filed.

(b) A complaint is filed charging a misdemeanor or infraction.

(c) The defendant is arraigned on a complaint that charges the defendant with a felony.

(d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.

(e) A summons is issued pursuant to Section 813.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Penal Code section 804 defines when the prosecution of an offense "commences," which stops the running of the statute of limitations. For a felony offense, prosecution commences upon the filing of an indictment or information, the defendant's arraignment on a complaint, or the issuance of an arrest warrant or bench warrant. (*See* Pen. Code, § 804.) However, this does not include the issuance of a summons, in which a defendant is ordered by the court to appear on a particular date. (*See* Pen. Code, § 813.) This discrepancy results in cases being filed for an arrest warrant just to stop the clock, even when the prosecution does not oppose allowing a defendant to 'walk in' on the warrant. With an outstanding warrant, a defendant who is allowed to surrender by the prosecuting agency remains at risk of arrest on a traffic stop or if targeted by a local fugitive apprehension team.

The Solution: This resolution would treat the issuance of a summons to secure the defendant's appearance on a filed case as an act that commences prosecution, same as an arrest warrant. This will increase the likelihood that the prosecution would seek a summons in appropriate cases, such as when there is an agreement to allow the self-surrender of a defendant who does not pose

a danger to public safety or a flight risk. It also ensures that defendants who are permitted to 'walk in' are not at risk of arrest due to an outstanding warrant.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESPONSIBLE FLOOR DELEGATE: Michael Fern

RESOLUTION 04-02-2019

DIGEST

Criminal Law: San Francisco Pretrial Assessment Services

Amends Penal Code section 1320.10 to allow San Francisco courts to continue providing pretrial assessment services through the office of San Francisco Pretrial Diversion.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1320.10 to read as follows:

§1320.10

(a) The courts shall establish pretrial assessment services. The services may be performed by court employees or the court may contract for those services with a qualified local public agency with relevant experience.

(b) Before the court decides to not enter into a contract with a qualified local public agency, the court shall find that agency will not agree to perform this function with the resources available or does not have the capacity to perform the function.

(c) If no qualified local agency will agree to perform this pretrial assessment function for a superior court, and the court elects not to perform this function, the court may contract with a new local pretrial assessment services agency established to specifically perform this role.

(d) For the purpose of the provision of pretrial assessment services, the court may not contract with a qualified local public agency that has primary responsibility for making arrests and detentions within the jurisdiction.

(e) Pretrial assessment services shall be performed by public employees.

(f) Notwithstanding subdivision (i), the Superior Court of the County of Santa Clara may contract with the Office of Pretrial Services of the County of Santa Clara, and the Superior Court of the County of San Francisco may contract with the office of San Francisco Pretrial Diversion, to provide pretrial assessment services within the Counties of Santa Clara and San Francisco and those offices and that office shall be eligible for funding allocations pursuant to subdivision (c) of Section 1320.27 and Section 1320.28.

(g) Notwithstanding subdivision (e), until January 1, 2023, a qualified local public agency in the City and County of San Francisco may contract with the existing not-for-profit entity that is performing pretrial services in the city and county for pretrial assessment services to provide continuity and sufficient time to transition the entity's employees into public employment.

(h) On or before February 1, 2019, the presiding judge of the superior court and the chief probation officer of each county, or the director of the County of Santa Clara's Office of Pretrial Services for that county, shall submit to the Judicial Council a letter confirming their intent to contract for pretrial assessment services pursuant to this section.

(i) For the purposes of this section:

(1) "Pretrial Assessment Services" does not include supervision of persons released under this chapter.

(2) A "qualified local public agency" is one with experience in all of the following:

(A) Relevant expertise in making risk-based determinations.

(B) Making recommendations to the courts pursuant to Section 1203.
(C) Supervising offenders in the community.
(D) Employing peace officers.

SEC. 1. This act shall become operative on October 1, 2019, and contingent upon Senate Bill 10 of the 2017–18 Regular Session becoming operative.

SEC. 2. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: National Lawyers Guild – San Francisco Bay Chapter

STATEMENT OF REASONS

The Problem: SB 10 creates a new statewide infrastructure to deliver pretrial services – without taking existing successful programs such as SF Pretrial into account. It seeks to dissolve San Francisco's effective current pretrial model by reassigning responsibility for pretrial assessment and supervision to the Probation Department. San Francisco Pretrial Diversion Project (SF Pretrial) has operated as a cost effective, independent, non-profit organization that provides case management, supervision, and assessment services for justice-involved populations in San Francisco for the last 43 years. SF Pretrial is embedded in our local Court and criminal justice system and is an industry-leader in ensuring individuals charged with a crime appear for trial, achieve maximum rehabilitation, and contribute to the safety of our communities. SF Pretrial outcomes meet and exceed those of preeminent programs across the Country, including the two models commonly used as pretrial replication models in Kentucky and Washington, D.C. SB 10 will destroy this effective and successful system and replace it with a more expensive system without any proven track record that is not presently in existence. SF pretrial operates under the presumption of innocence until proven guilty, while probation departments are law enforcement agencies traditionally operating post-conviction.

The Solution: Amend Penal Code Section 1320.10 (SB 10) to include language that mirrors the exception created for Santa Clara County, preserving SF Pretrial as an independent, non-profit organization providing pretrial services in San Francisco. Penal Code §1320.10 already provides an exemption for Santa Clara County which allows them to keep their existing structure in place. All subsequent language in related budget and legislative bills should mirror this language to ensure the City & County of San Francisco is eligible for State allocated pretrial funding. Los Angeles and other counties are also exploring alternative options to the structures established under SB 10.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Richard P. Koch

RESOLUTION 04-03-2019

DIGEST

Discovery: Protecting the Personal Identifying Information of Victims and Witnesses

Amends Penal Code section 1054.2 to protect personal identifying information of victims and witnesses in criminal cases.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1054.2 to read as follows:

§1054.2

(a) (1) Except as provided in paragraph (2), no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, ~~the address or telephone number~~ any personal identifying information, as defined in Section 530.55, of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, other than the name of that victim or witness, unless specifically permitted to do so by the court after a hearing and a showing of good cause.

(2) Notwithstanding paragraph (1), an attorney may disclose or permit to be disclosed the ~~address or telephone number~~ personal identifying information of a victim or witness to persons employed by the attorney or to persons appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by an attorney shall be informed by the attorney that further dissemination of the information, except as provided by this section, is prohibited.

(3) Willful violation of this subdivision by an attorney, persons employed by the attorney, or persons appointed by the court is a misdemeanor. Nothing in this section prohibits prosecution under any other provision of law.

(b) If the defendant is acting as his or her own attorney, the court shall endeavor to protect the ~~address or telephone number~~ personal identifying information of victim or witness by providing for contact only through a private investigator licensed by the Department of Consumer Affairs and appointed by the court or by imposing other reasonable restrictions, absent a showing of good cause as determined by the court.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Existing law prohibits defense attorneys from disclosing the telephone numbers and addresses of victims and witnesses to anyone outside their firm, unless a court has found good cause to do so. This rule is designed to protect victims and witnesses from harassment and retaliation and to ensure that disclosure of their personal contact information is narrowly-tailored to a legitimate defense. However, all personal identifying information should be protected from unfettered disclosure, not just addresses or telephone numbers. This is especially true in cases

involving fraud or theft, where the criminal discovery may include a treasure trove of personal identifying information, such as email accounts, dates of birth, Social Security numbers, bank records, credit cards, driver's licenses, etc.

The Solution: This resolution would expand existing protections that safeguard a victim or witness's address and telephone number to cover personally identifying information as defined in Penal Code section 530.55. As before, disclosures to third parties can still be made if a court finds good cause to do so.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Michael Fern, 211 W. Temple St., Ste. 1000, Los Angeles, CA 90012, (213) 257-2438, sclawyer@gmail.com.

RESPONSIBLE FLOOR DELEGATE: Michael Fern

RESOLUTION 04-04-2019

DIGEST

Prisons: Requiring Confidential Calls When Attorney is More than 75 Miles Away

Adds Penal Code section 5058.7 to provide that institutions must approve confidential call requests under certain circumstances.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to add California Penal Code section 5058.7 to read as follows:

§5058.7

A "confidential call" means a telephone call between an inmate and his/her attorney which both parties intend to be private. If the attorney's place of work is greater than 75 radius miles from the institution, confidential calls must be approved for a minimum of thirty (30) minutes once a month, unless the request is for less.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Unlike many other people, inmates cannot just pick up the phone, send an email, or text message to reach their attorney confidentially. Only two main options exist at every prison, and unless inmates want to waive confidentiality and privilege by calling their attorney on a recorded line, the amount to sending attorney-client communication back to before Antonio Meucci and Alexander Graham Bell created the telephone: (1) Attorney arranges a day and time to visit, which works if the attorney is within a reasonable distance, (2) attorney and client write letters, mark them legal mail, and send them off through our postal service, which works if the matters discussed are not urgent. Some prisons provide a third option, which is for the attorney to arrange a day and time with the jail to call and talk to the inmate on an unrecorded line with nobody else within earshot. That is known as a "confidential call," and it works when the matter is urgent, and the attorney is outside of driving distance.

The problem is many prisons routinely deny confidential calls, refusing to factor in that the attorney is far away, that the matter is urgent, or anything else. That takes away the ability of inmate clients and their attorney to exercise their right and need to confidentially communicate in a way that can be done quickly and without huge time and travel expenses. Not only does this make representation by an attorney from a distance much harder, but the added cost makes finding representation even harder; they already have trouble finding representation from anyone who lives or works near them, let alone from someone further away, and this adds to that problem.

The Solution: This resolution requires prisons to allow for confidential calls between attorneys and inmates when the attorney works greater than 75 radius miles from the prison, for at least 30 minutes once a month, unless the request is for less. This will enable inmates to exercise their rights to confidential attorney-client communications better and remove an obstacle to finding representation for inmates.

IMPACT STATEMENT
This resolution may require related amendments to the California Code of Regulations. The specific regulation is Title 15, Division 3, Chapter 1, Subchapter 4, Article 2, Section 3282 (15 CCR § 3282).

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Ben Rudin

RESOLUTION 04-05-2019

DIGEST

Criminal Procedure: Motion Held Within Ten Days

Amends Penal Code section 1538.5 to require misdemeanor motions to suppress be heard within ten days of filing, absent good cause.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1538.5 to read as follows:

§1538.5

(a) (1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(A) The search or seizure without a warrant was unreasonable.

(B) The search or seizure with a warrant was unreasonable because any of the following apply:

(i) The warrant is insufficient on its face.

(ii) The property or evidence obtained is not that described in the warrant.

(iii) There was not probable cause for the issuance of the warrant.

(iv) The method of execution of the warrant violated federal or state constitutional standards.

(v) There was any other violation of federal or state constitutional standards.

(2) A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities and proof of service. The memorandum shall list the specific items of property or evidence sought to be returned or suppressed and shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Sections 170 to 170.6, inclusive, of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) (1) Whenever a search or seizure motion is made in the superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(2) While a witness is under examination during a hearing pursuant to a search or seizure motion, the judge or magistrate shall, upon motion of either party, do any of the following:

(A) Exclude all potential and actual witnesses who have not been examined.

(B) Order the witnesses not to converse with each other until they are all examined.

(C) Order, where feasible, that the witnesses be kept separated from each other until they are all examined.

(D) Hold a hearing, on the record, to determine if the person sought to be excluded is, in fact, a person excludable under this section.

(3) Either party may challenge the exclusion of any person under paragraph (2).

(4) Paragraph (2) does not apply to the investigating officer or the investigator for the defendant, nor does it apply to officers having custody of persons brought before the court.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, 1238, or 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section, Section 1238 or 1466, the property is not subject to lawful detention or if the time for initiating the proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of the court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5 or 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of the proceedings, the property is no longer subject to lawful detention.

(f) (1) If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made only upon filing of an information, except that the defendant may make the motion at the preliminary hearing, but the motion shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

(2) The motion may be made at the preliminary examination only if, at least five court days before the date set for the preliminary examination, the defendant has filed and personally served on the people a written motion accompanied by a memorandum of points and authorities as required by paragraph (2) of subdivision (a). At the preliminary examination, the magistrate may grant the defendant a continuance for the purpose of filing the motion and serving the motion upon the people, at least five court days before resumption of the examination, upon a showing that the defendant or his or her attorney of record was not aware of the evidence or was not aware of the grounds for suppression before the preliminary examination.

(3) Any written response by the people to the motion described in paragraph (2) shall be filed with the court and personally served on the defendant or his or her attorney of record at least two court days prior to the hearing at which the motion is to be made.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. Where the motion is filed and served on the prosecution in court during a hearing on the case, the hearing on the motion shall be conducted within ten days of filing and service, absent good cause or the consent of the defendant. If the hearing does not commence within ten days of the filing and service without good cause or the defendant's consent, the court shall order the defendant released, and the motion shall be heard before trial. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 court days after notice to the people, unless the people are

willing to waive a portion of this time. Any written response by the people to the motion shall be filed with the court and personally served on the defendant or his or her attorney of record at least two court days prior to the hearing, unless the defendant is willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people, within 15 days after the preliminary hearing, request a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice. If the defendant's motion is granted at a special hearing, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, either on the court's own motion or the motion of the people after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the

superior court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the appellate division, in accordance with the California Rules of Court provisions governing appeals to the appellate division in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he or she is in custody and not returned to custody unless the proceedings are resumed in the trial court and he or she is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file a petition, the defendant shall be released pursuant to Section 1318, unless (1) he or she is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he or she is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1, and the court orders that the defendant be discharged from actual custody upon bail.

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, 1238, or 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and, subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order that is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of the motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318. In the case of an appeal by the defendant in a misdemeanor case from the denial of the motion, the trial court may, in its discretion, order or deny a stay of further proceedings pending disposition of the appeal.

(m) The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. Review on appeal may be obtained by the defendant provided that at some stage of the

proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

(n) This section establishes only the procedure for suppression of evidence and return of property, and does not establish or alter any substantive ground for suppression of evidence or return of property. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions. Nothing in this section shall be construed as altering (1) the law of standing to raise the issue of an unreasonable search or seizure; (2) the law relating to the status of the person conducting the search or seizure; (3) the law relating to the burden of proof regarding the search or seizure; (4) the law relating to the reasonableness of a search or seizure regardless of any warrant that may have been utilized; or (5) the procedure and law relating to a motion made pursuant to Section 871.5 or 995, or the procedures that may be initiated after the granting or denial of a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in a felony case, the people may file a petition for writ of mandate or prohibition in the court of appeal, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date that is less than 30 days from the granting of a defendant's motion at a special hearing in a felony case, the people, if they have not filed a petition and wish to preserve their right to file a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file a petition and shall serve a copy of the notice upon the defendant.

(p) If a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available.

(q) The amendments to this section enacted in the 1997 portion of the 1997–98 Regular Session of the Legislature shall apply to all criminal proceedings conducted on or after January 1, 1998.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

The Problem: A defendant has a constitutional right to challenge the admissibility of evidence obtained in violation of the Fourth Amendment. Section 1538.5 lays out the procedure for such hearings, and the filing requirements. The problem is that while section 1538.5 requires a court to conduct a suppression hearing within ten days of filing on a *felony*, it sets no limits on the timing of such a hearing for misdemeanors. In practical terms, this means that misdemeanor defendants detained solely on the basis of illegally obtained evidence must remain in jail for at least 30 actual days before they can exercise their Fourth Amendment rights – a term of imprisonment far longer than most misdemeanor defendants face if they simply pled to the charge.

The Solution: This resolution would clarify that courts cannot simply refuse to consider the constitutionality of a misdemeanor defendant's detention until the defendant has spent a month or

more in jail. Instead, absent a showing of good cause or the defendant's consent, a Fourth Amendment challenge must be heard within 10 days of filing assuming the prosecutor is properly notified. Where a hearing is continued pas the ten day period without good cause, the court must release a detained misdemeanor defendant, and then hold the hearing before commencing trial.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Nick Stewart-Oaten

RESOLUTION 04-06-2019

DIGEST

Pleas: Not Guilty by Reason of Insanity

Amends Penal Code section 25 to replace the M'Naghten definition of insanity with the Model Penal Code definition of insanity.

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 25 to read as follows:

§25

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that ~~he or she~~ at the time of the charged offense, as a result of mental disease or defect, he or she lacked substantial capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law. ~~was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.~~

(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

The Problem: Roughly a quarter of Californians serving sentences in state prison suffer from a serious mental illness. The mass imprisonment of the mentally ill is not only cruel, it is counter-productive, as prisons are ill-equipped to handle the rehabilitative and safety needs of those suffering from mental illness, and imprisonment does little to address offenses caused by illness. One of the primary reasons for the vast over-criminalization of mental illness was a 1980's sponsored change to the definition of legal insanity. The 1980's definition precludes a person whose mental illness was the direct cause of the offense from asserting the defense and seeking mandatory hospitalization even where the person was unable to comply with the law at the time of the offense as a result of mental illness. The current definition is so restrictive, for example, that courts have held that evidence that a defendant suffers from paranoid schizophrenia and believed that the victim of his assault was a demon was insufficient to support a finding of insanity under the current rule.

The Solu**tion**: This resolution would adopt the Model Penal Code's definition of insanity which is in effect in twenty other states. Instead of asking whether the defendant knew that his actions were "wrong," the rule would ask whether the defendant was incapable of complying with the law as a result of mental illness at the time of the offense. As before, defendants found not guilty by reason of insanity would be committed to a locked state hospital until restored to sanity, while the onus would remain on the defendant to prove each of the elements of the defense.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Nick Stewart-Oaten, 213-974-3000, 320 W. Temple Street, 5th Floor, Los Angeles, CA 90012

RESPONSIBLE FLOOR DELEGATE: Nick Stewart-Oaten

RESOLUTION 04-07-2019

DIGEST
Criminal Procedure: Fair, Unbiased Jury Selection
Adds Code of Civil Procedure section 231.6 to preclude discriminatory use of peremptory challenges in criminal jury trials.

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Code of Civil Procedure section 231.6 to read as follows:

§231.6

(a) This statute applies in all criminal jury trials.

(b) A party may object to the use of a peremptory challenge to raise the issue of improper based upon the characteristics of a juror as found in Code of Civil Procedure section 231.5. The court may also raise this objection on its own. The objection may be made by citing this statute. Any further discussion shall be conducted outside the presence of the jury. The objection must be made before the potential juror is excused, unless new information is discovered.

(c) Upon objection to the exercise of a peremptory challenge pursuant to this statute, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised. The party making the objection does not need to make a prima facie showing that the challenge was made for an improper motive.

(d) The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity or any other factor found in Code of Civil Procedure section 231.5 as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(e) For purposes of this statute, an "objective observer" is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in California.

(f) In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(g) The court shall subject the following reasons for peremptory challenges to heightened scrutiny: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided

unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

(Proposed new language underlined; language to be deleted stricken)

PROPONENTS: Mark Harvis, Marc Sallus, Nick Stewart-Oaten, Albert Menaster, Robin Bernstein-Lev, Casey Lilienfeld, Robert Lu, Thomas Moore, Natasha Brown, Albert Camacho.

STATEMENT OF REASONS

The Problem: Racial and other types of discrimination, whether deliberate or as a result of implicit bias, is rampant in criminal cases. Parties use peremptory challenges to remove persons, particularly persons of color, and give very transparent excuses to justify juror's excusal. Unfortunately trial courts and reviewing courts are loathe to find a juror was removed for a discriminatory reason, giving credence to even the flimsiest excuses. The United States Supreme Court has ruled that removing a juror for a biased reason is unconstitutional.

The Solution: This resolution is based almost completely upon Washington State General Rule 37. That rule is, quite frankly, a brilliant and reasonable solution to the problem of biased use of peremptory challenges. It will be easy to implement and will go a long way toward making criminal jury trials fair.

IMPACT STATEMENT
This resolution does not impact any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None Known.

AUTHOR AND/OR PERMANENT CONTACT: Mark Harvis, Los Angeles County Public Defender, 320 W. Temple Suite 590, Los Angeles, CA 90012 213 974-3066

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RESOLUTION 04-08-2019

DIGEST

Search Warrants: Request by Sexual Assault Victim for STD Testing

Amends Penal Code section 1524.1 to extend a victim-requested search warrant for HIV testing to include all STDs.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1524.1, to read as follows:

§ 1524.1

(a) The primary purpose of the testing and disclosure provided in this section is to benefit the victim of a crime by informing the victim whether the defendant is infected with ~~the HIV virus~~ a sexually transmitted disease, including but not limited to chlamydia, gonorrhea, hepatitis, herpes, human immunodeficiency virus, human papillomavirus, trichomoniasis, and syphilis. It is also the intent of the Legislature in enacting this section to protect the health of both victims of crime and those accused of committing a crime. Nothing in this section shall be construed to authorize mandatory testing or disclosure of test results for the purpose of a charging decision by a prosecutor, nor, except as specified in subdivisions (g) and (i), shall this section be construed to authorize breach of the confidentiality provisions contained in Chapter 7 (commencing with Section 120975) of Part 4 of Division 105 of the Health and Safety Code.

(b) (1) Notwithstanding the provisions of Chapter 7 (commencing with Section 120975) of Part 4 of Division 105 of the Health and Safety Code, when a defendant has been charged by complaint, information, or indictment with a crime, or a minor is the subject of a petition filed in juvenile court alleging the commission of a crime, the court, at the request of the victim, may issue a search warrant for the purpose of testing the accused's blood or oral mucosal transudate saliva ~~with any HIV test, as defined in Section 120775 of the Health and Safety Code~~ for a sexually transmitted disease only under the following circumstances: when the court finds, upon the conclusion of the hearing described in paragraph (3), or in those cases in which a preliminary hearing is not required to be held, that there is probable cause to believe that the accused committed the offense, and that there is probable cause to believe that blood, semen, or any other bodily fluid identified by the State Department of Health Services in appropriate regulations as capable of transmitting ~~the human immunodeficiency virus~~ a sexually transmitted disease has been transferred from the accused to the victim.

(2) Notwithstanding Chapter 7 (commencing with Section 120975) of Part 4 of Division 105 of the Health and Safety Code, when a defendant has been charged by complaint, information, or indictment with a crime under Section 220, 261, 261.5, 262, 264.1, 266c, 269, 286, 287, 288, 288.5, 288.7, 289, ~~or~~ 289.5, or 289.6, or former Section 288a, or with an attempt to commit any of the offenses, and is the subject of a police report alleging the commission of a separate, uncharged offense that could be charged under Section 220, 261, 261.5, 262, 264.1, 266c, 269, 286, 287, 288, 288.5, 288.7, 289, ~~or~~ 289.5, or 289.6, or former Section 288a, or of an attempt to commit any of the offenses, or a minor is the subject of a petition filed in juvenile court alleging the commission of a crime under Section 220, 261, 261.5, 262, 264.1, 266c, 269, 286, 287, 288, 288.5, 288.7, 289, ~~or~~ 289.5, or 289.6, or former Section 288a, or of an attempt to

commit any of the offenses, and is the subject of a police report alleging the commission of a separate, uncharged offense that could be charged under Section 220, 261, 261.5, 262, 264.1, 266c, 269, 286, 287, 288, 288.5, 288.7, 289, ~~or~~ 289.5, or 289.6, or former Section 288a, or of an attempt to commit any of the offenses, the court, at the request of the victim of the uncharged offense, may issue a search warrant for the purpose of testing the accused's blood or oral mucosal transudate saliva ~~with any HIV test, as defined in Section 120775 of the Health and Safety Code~~ for a sexually transmitted disease only under the following circumstances: when the court finds that there is probable cause to believe that the accused committed the uncharged offense, and that there is probable cause to believe that blood, semen, or any other bodily fluid identified by the State Department of Health Services in appropriate regulations as capable of transmitting ~~the human immunodeficiency virus~~ a sexually transmitted disease has been transferred from the accused to the victim. As used in this paragraph, Section 289.5 refers to the statute enacted by Chapter 293 of the Statutes of 1991, penetration by an unknown object.

(3) (A) Prior to the issuance of a search warrant pursuant to paragraph (1), the court, where applicable and at the conclusion of the preliminary examination if the defendant is ordered to answer pursuant to Section 872, shall conduct a hearing at which both the victim and the defendant have the right to be present. During the hearing, only affidavits, counter affidavits, and medical reports regarding the facts that support or rebut the issuance of a search warrant under paragraph (1) shall be admissible.

(B) Prior to the issuance of a search warrant pursuant to paragraph (2), the court, where applicable, shall conduct a hearing at which both the victim and the defendant are present. During the hearing, only affidavits, counter affidavits, and medical reports regarding the facts that support or rebut the issuance of a search warrant under paragraph (2) shall be admissible.

(4) A request for a probable cause hearing made by a victim under paragraph (2) shall be made before sentencing in the superior court, or before disposition on a petition in a juvenile court, of the criminal charge or charges filed against the defendant.

(c) (1) In all cases in which the person has been charged by complaint, information, or indictment ~~with a crime~~, or is the subject of a petition filed in a juvenile court, alleging the commission of a crime under Section 220, 261, 261.5, 262, 264.1, 266c, 269, 286, 287, 288, 288.5, 288.7, 289, or 289.5, or 289.6, or former Section 288a, or with an attempt to commit any of the offenses, the prosecutor shall advise the victim of his or her right to make this request. To assist the victim of the crime to determine whether he or she should make this request, the prosecutor shall refer the victim to the local health officer for prerequest counseling to help that person understand the extent to which the particular circumstances of the crime may or may not have put the victim at risk of transmission of ~~HIV~~ a sexually transmitted disease from the accused, to ensure that the victim understands both the benefits and limitations of ~~the~~ current tests ~~for HIV~~, to help the victim decide whether he or she wants to request that the accused be tested, and to help the victim decide whether he or she wants to be tested.

(2) The Department of Justice, in cooperation with the California District Attorneys Association, shall prepare a form to be used in providing victims with the notice required by paragraph (1).

(d) If the victim decides to request ~~HIV~~ testing of the accused, the victim shall request the issuance of a search warrant, as described in subdivision (b). Neither the failure of a prosecutor to refer or advise the victim as provided in this subdivision, nor the failure or refusal by the victim to seek or obtain counseling, shall be considered by the court in ruling on the victim's request.

(e) The local health officer shall make provision for administering all ~~HIV~~ tests ordered pursuant to subdivision (b).

(f) Any blood or oral mucosal transudate saliva tested pursuant to subdivision (b) shall be subjected to appropriate confirmatory tests to ensure accuracy of the first test results, and under no circumstances shall test results be transmitted to the victim or the accused unless any initially reactive test result has been confirmed by appropriate confirmatory tests for positive reactors.

(g) The local health officer shall have the responsibility for disclosing test results to the victim who requested the test and to the accused who was tested. However, no positive test results shall be disclosed to the victim or to the accused without also providing or offering professional counseling appropriate to the circumstances.

(h) The local health officer and victim shall comply with all laws and policies relating to medical confidentiality subject to the disclosure authorized by subdivisions (g) and (i). Any individual who files a false report of sexual assault in order to obtain test result information pursuant to this section shall, in addition to any other liability under law, be guilty of a misdemeanor ~~punishable as provided in subdivision (c) of Section 120980 of the Health and Safety Code~~. Any individual as described in the preceding sentence who discloses test result information obtained pursuant to this section shall also be guilty of an additional misdemeanor ~~punishable as provided for in subdivision (c) of Section 120980 of the Health and Safety Code~~ for each separate disclosure of that information.

(i) Any victim, parent or guardian of a minor victim, or authorized legal representative who receives information from the health officer pursuant to subdivision (g) may disclose the test results as the victim or recipient deems necessary to protect ~~his or her~~ the victim's health and safety or the health and safety of his or her family or sexual partner.

(j) Any person transmitting test results or disclosing information pursuant to this section shall be immune from civil liability for any actions taken in compliance with this section.

(k) The results of any blood or oral mucosal transudate saliva tested pursuant to subdivision (b) shall not be used in any criminal proceeding as evidence of either guilt or innocence.

(l) Any rights of the victim under this section may also be exercised by a parent or guardian of the victim, if the victim is a minor, or by an authorized legal representative.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Existing law permits a victim of sexual assault who was exposed to the defendant's bodily fluids to obtain a search warrant directing the local health officer to test the defendant for HIV and disclose the results to both the defendant and the victim. The purpose of this law is to protect the health of both the defendant and the victim, who may not share the defendant's results except to protect the health or safety of a family member or sexual partner. Under circumstances that warrant a court granting a victim's request for a defendant to be tested for HIV, there is no reason to exclude testing for other sexually transmitted diseases, which can lead to sterility, increased cancer risk, or death, if left untreated.

The Solution: This resolution would allow a victim of sexual assault to request a search warrant that allows testing for all sexually transmitted diseases, including but not limited to HIV. In addition, it clarifies that this warrant can be requested by a parent or guardian of a minor victim or an authorized legal representative.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known

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RESPONSIBLE FLOOR DELEGATE: Michael Fern

RESOLUTION 04-09-2019

DIGEST
Penal Code: Petty Theft Infraction Limit
Amends Penal Code section 490.1 to raise the infraction limit from $50 to $100.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 490.1, to read as follows:

§490.1

(a) Petty theft, where the value of the money, labor, real or personal property taken is of a value which does not exceed ~~fifty~~ one hundred dollars ($~~50~~100), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction.

(b) Any offense charged as an infraction under this section shall be subject to the provisions of subdivision (d) of Section 17 and Sections 19.6 and 19.7.

A violation which is an infraction under this section is punishable by a fine not exceeding two hundred fifty dollars ($250).

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Recently, the threshold for a felony grand theft was $400 but was recently raised to $950. This helps account for the changes in cost of living and the value of money. However, the amount limit for which an infraction can be charged has not risen. When the value of the theft is less than $100, this gives offenders a way to be held accountable without facing a more serious misdemeanor charge. Also, it is a way for prosecutors to deal with relatively minor cases without needing to file misdemeanor charge and potentially going to multi-day jury trial over a minor theft.

The Solution: The change would give prosecutors and police the option of charging an infraction instead of a misdemeanor on a larger percentage of cases. It does not take power away from a prosecutor because they still have the option of charging a misdemeanor if they so choose. Also, this provision is unlikely to be abused by criminal defendants because it only applies if the defendant does not have a prior theft conviction.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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