

# POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Surveillance of  
Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 --  
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Week Of	Topic	Guests	General
Jan. 20 2015	<b>New Laws 2015: Competency, Juvenile and Human Trafficking</b>	L.D. Louis Terry Wiley Casey Bates	30 min

## **New Laws in 2015: Mental Competency, Juvenile, and Human Trafficking**

### **I. Mental Competency**

#### **Penal Code section 1367 (SB 1412)**

1. Penal Code section 1367 continues to prohibit trial and punishment for a mentally incompetent defendant. The section has been amended to additionally prohibit the revocation of probation, mandatory supervision, postrelease community supervision (PRCS) or parole while a defendant is mentally incompetent.

2. Section 1367 also provides that:

a. Section 1370 (mental incompetence procedures) shall also apply to persons alleged to have violated felony probation or mandatory supervision.

b. Defendants who are on formal or informal misdemeanor probation are added to Section 1370.01, which governs proceedings, including placement and treatment, for misdemeanor defendants who have been found to be incompetent due to a mental disorder. Penal Code section 1367.1, which also applied to misdemeanor defendants, has been repealed.

{Under section 1367.1 when the defense attorney announced a belief that his client may be mentally incompetent, it triggered a referral for evaluation and treatment under section 4011.6, in other words, an involuntary 72-hour period of medical evaluation. This evaluation was not an evaluation of mental competency and had the effect of delaying trial. Section 1367.1 also provided that if treatment did not restore competence, the misdemeanor defendant was then subject to the same proceedings as is a felony defendant thought be incompetent to stand trial due to a mental disorder.

A felony defendant however, is not required to undergo evaluation and treatment prior to a competency determination. In *Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, the court of appeal found section 1367.1 unconstitutional because it deprived misdemeanor defendants of the equal protection of laws. The 2015 amendment repeals section 1367.1.}

c. Defendants who are on postrelease community supervision or parole are subject to a new provision, section 1370.02, discussed in more detail below.

**Penal Codes sections 1368 and 1368.1**      **(SB 1412)**

1. Penal Code section 1368 concerns the provisions for mental competence to stand trial. The statute requires the judge, if a doubt arises in his or her mind as to the competence of the defendant to stand trial, to state that doubt in the record and to obtain the opinion of defense counsel whether the defendant is mentally incompetent. While this procedure continues to apply during the pendency of an action and prior to judgment, it has been expanded under the 2015 amendments to include “during revocation proceedings for a violation of probation, mandatory supervision, postrelease community supervision or parole.” (Pen. Code, § 1368(a).

2. Penal Code section 1368.1 continues to provide that a defendant may move to dismiss a pending felony on the ground that there is not reasonable cause to believe a felony has been committed. In addition, section 1368.1 is amended to provide that if the proceeding involves a violation of probation, mandatory supervision, PRCS or parole, the defendant’s counsel may move to reinstate probation on the ground that there is not probable cause to believe that the defendant violated the terms of his supervision. Pen. Code, § 1368.1(c).

**Penal Code section 1369**      **(SB 1412)**

When determining a defendant’s competency in a proceeding for violation of probation, mandatory supervision, PRCS violation, mandatory supervision or parole, only a court trial – not a jury trial – is required. Competency trials in other proceedings (for example, pending felonies or misdemeanors), may be by way of court *or* jury trial. (Pen. Code, § 1369(g).

**Penal Code section 1369.1**      **(SB 1412)**

Adds a new Penal Code section provision –section 1370.2 (mental competence proceeding for defendants who violate PRCS, see discussion below) to those provisions that apply to antipsychotic medication provided in jail. (Pen. Code, § 1369.1(a).

**Penal Code section 1370**      **(SB 1412)**

1. Among its numerous provisions, section 1370 requires the court to hear and determine whether the mentally incompetent defendant lacks capacity to make decisions regarding the administration of antipsychotic medication. In making this decision, under the 2015 amendments, the court is required to consider the opinion of the professionals who examine a defendant on the issue of mental competence under section 1369(a). (Pen. Code, § 1370(2)(B).

2. Under the 2015 amendments, an order for the involuntary administration of antipsychotic medication is valid at any facility housing the defendant. {Thus, the medication can continue upon the defendant’s return to county jail for trial.} (Pen. Code, § 1370(2)(B)(ii).

3. The 2015 amendments permit the district attorney, county counsel, or representative of a facility where a defendant is housed, to petition the court for an order to administer involuntary medication. Particular criteria of section 1370(a)(2)(B), i.e. defendant’s dangerousness to others and the seriousness of the offense, must be satisfied. (Pen. Code, § 1370(2)(D)(vii).

4. Penal Code section 1370(a)(7) provides that an order authorizing the involuntary administration of antipsychotic medication is valid for one year. Under the 2015 amendments,

within 60 days of the expiration of the one-year involuntary medication order, the district attorney, county counsel or representative of a facility where a defendant is housed, is authorized to petition the court for a renewal of an involuntary medication for renewal of an involuntary medication order, within 60 days before the expiration of any current order. (Pen. Code, § 1370(a)(7)(B).

5. Section 1370(b)(1) provides that within 90 days of a defendant's commitment to a state hospital or other treatment facility, the medical director of that facility must make a written report to the court concerning the defendant's progress towards recovery of mental competency. If the report indicates there is no substantial likelihood the defendant will regain mental competence in the foreseeable future, the committing court shall order the defendant to be returned to court for further proceedings.

Under the 2015 amendments, the defendant must be returned to court within 10 days of the court receiving the report which states that regaining mental competence is not likely. The amendments require the medical director at the facility treating such a defendant to promptly notify and provide a copy of the report to the defense attorney *and the district attorney*, and to provide a separate notification to the sheriff so that transportation for the defendant can be provided. (Pen. Code, § 1370(b)(1)(A)&(B)(1)(ii).

**NOTE:** It is particularly important for calendar DA's to review these reports so that deadlines required to institute a Murphy conservatorship are not missed. *In Alameda County, if the charges against the defendant involve death, great bodily injury, or the threat of death or great bodily injury, the trial or calendar DA should contact the SVP unit as soon as possible.*

6. Under the 2015 amendments to Penal Code section 1370(c)(1), a defendant who has not recovered mental competence *must* be returned to the court no later than 90 days before the expiration of his or her maximum commitment.

Maximum commitment is defined as followed under the 2015 amendments: "At the end of three years from the date of commitment or a period of commitment equal to the maximum term of commitment provided by law for the most serious offense in the information, indictment, or misdemeanor complaint, or the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision, whichever is shorter. (Pen. Code, § 1370(c)(1).)

**NOTE:** In order to be aware of this 90-day date, DA's must calculate when the commitment term will end. The time frames are critical to the deadlines for instituting a Murphy conservatorship. *In Alameda County, if the charges against the defendant are serious and the competency commitment is six months from termination, contact the SVP Unit.*

7. Section 1370(4)(d) provides that a criminal action (such as a pending felony or pending probation violation) remains subject to dismissal in the interest of justice under Penal Code section 1385. Under the 2015 amendments, this is not true for a violation of mandatory supervision. If a defendant is not placed under a conservatorship or a conservatorship is terminated, the court must reinstate mandatory supervision and may modify its terms to include appropriate mental health treatment or may refer the matter to a local mental health court, reentry court or other collaborative mental health justice court.

**Penal Code section 1370.02 (SB 1412)**

1. This is a new Penal Code section that sets forth procedures for handling a mental competence issue when a defendant is facing a PRCS violation or a parole violation.
2. This section provides that if such a defendant is found mentally competent, the formal revocation hearing must occur within a reasonable time after resumption of criminal proceedings, *but* in no event may the defendant be detained in custody for over 180 days from the date of arrest. (Pen. Code, § 1370.02(a).)
3. Except for certain specified sex offenders and lifetime parolees, if the defendant is found mentally incompetent, the court must dismiss the pending revocation matter and return the defendant to supervision.

The court is authorized to do any of the following in order to meet the mental health needs of the defendant: (1) modify the terms and conditions of supervision to include mental health treatment; (2) refer the matter to the local mental health court, reentry court or collaborative justice court; (3) refer the matter to the public guardian to initiate conservatorship proceedings. (Pen. Code, § 1370.02(b)(1)(2)(3).).

4. If the defendant is subject to parole under Penal Code section 3000.1 (lifetime parole) or 3333(b)(4) (20 years, 6 months parole for specified sex crimes) and is found mentally incompetent, the court *shall* order the parolee to undergo treatment under Penal Code section 1370 to restore mental competency. (Pen. Code, § 1370.02(c)(1).)
5. If the parolee is not restored to competency within the maximum period of confinement and the court dismisses the revocation, the court must return the parolee to parole supervision. If the defendant is returned to parole supervision, the court may do any of the acts listed in #3 above to meet the mental health needs of the parolee. (Pen. Code, § 1370.02(c)(2)(A)(B)(C).)
6. If a conservatorship is established for a defendant on PRCS or parole, the county or the California Department of Corrections and Rehabilitation cannot compassionately release the defendant or otherwise cause the termination of supervision or parole based on the conservatorship. (Pen. Code, § 1370.02(d).)

**Penal Code Section 1370.1 (SB 1412)**

This Penal Code section concerns the procedures for applicable to mentally incompetent defendants who are also developmentally disabled. Under the 2015 amendments, the procedures extend to violations of probation and mandatory supervision violations. If the defendant is not restored to competence, he must be returned to court (although the 10 and 90 day rules are not referenced in these amendments.) Upon return to court, the defendant will be subject to conservatorship provisions.

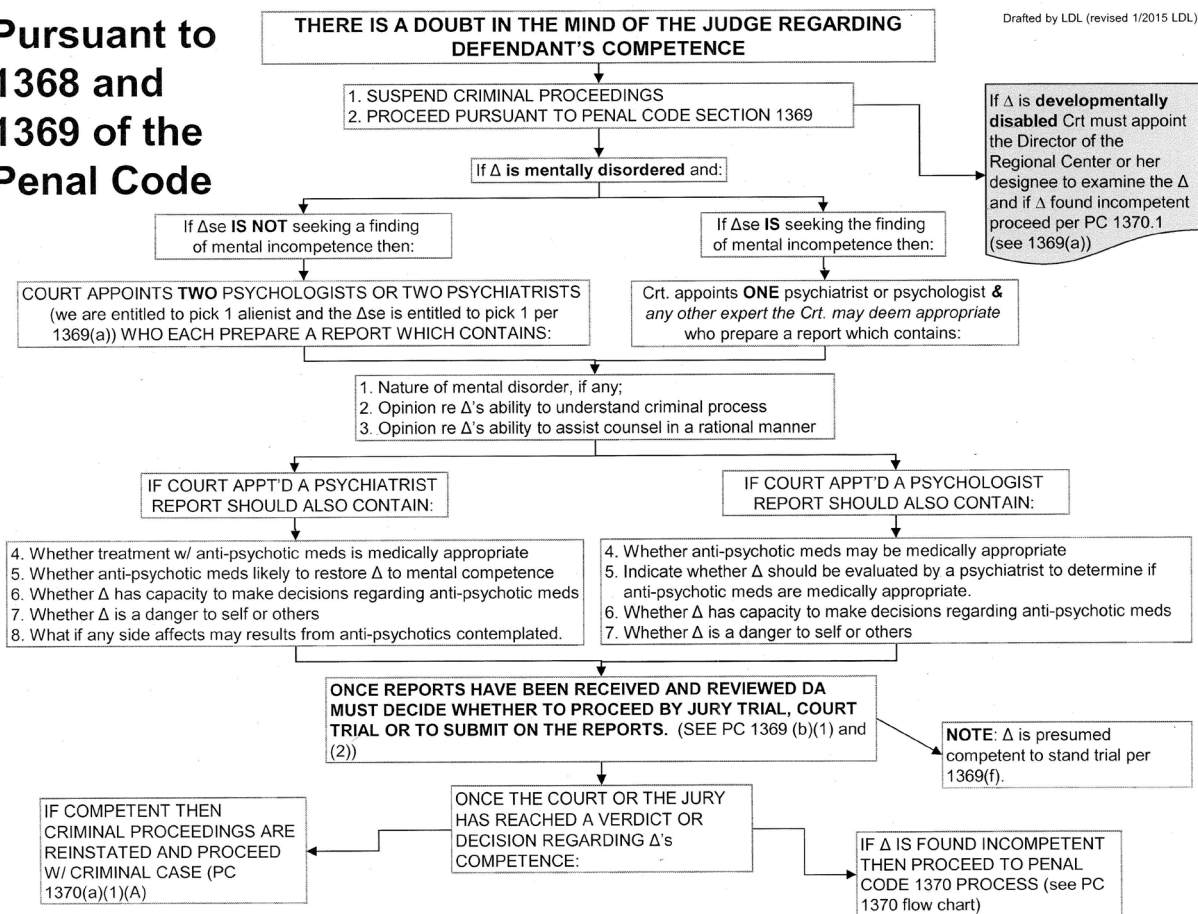
**NOTE:** *In Alameda County, if the developmentally delayed defendant has received a report indicating he is not likely to regain competence, or is approximately six months away from the three-year commitment deadline, and the charges involve serious or violent felonies, contact the SVP unit as soon as possible.*

**Penal Code Section 1375.5 (SB 1412)**

This statute provides that time spent by a mentally incompetent defendant in a hospital or other facility shall be credited on any term of imprisonment for which the defendant is sentenced in a criminal case that had proceedings suspended under Penal Code sections 1370 or 1370.1. The section now cross-references Penal Code section 1370.01, which pertains to mental incompetence in misdemeanor cases or for misdemeanor probation violations.

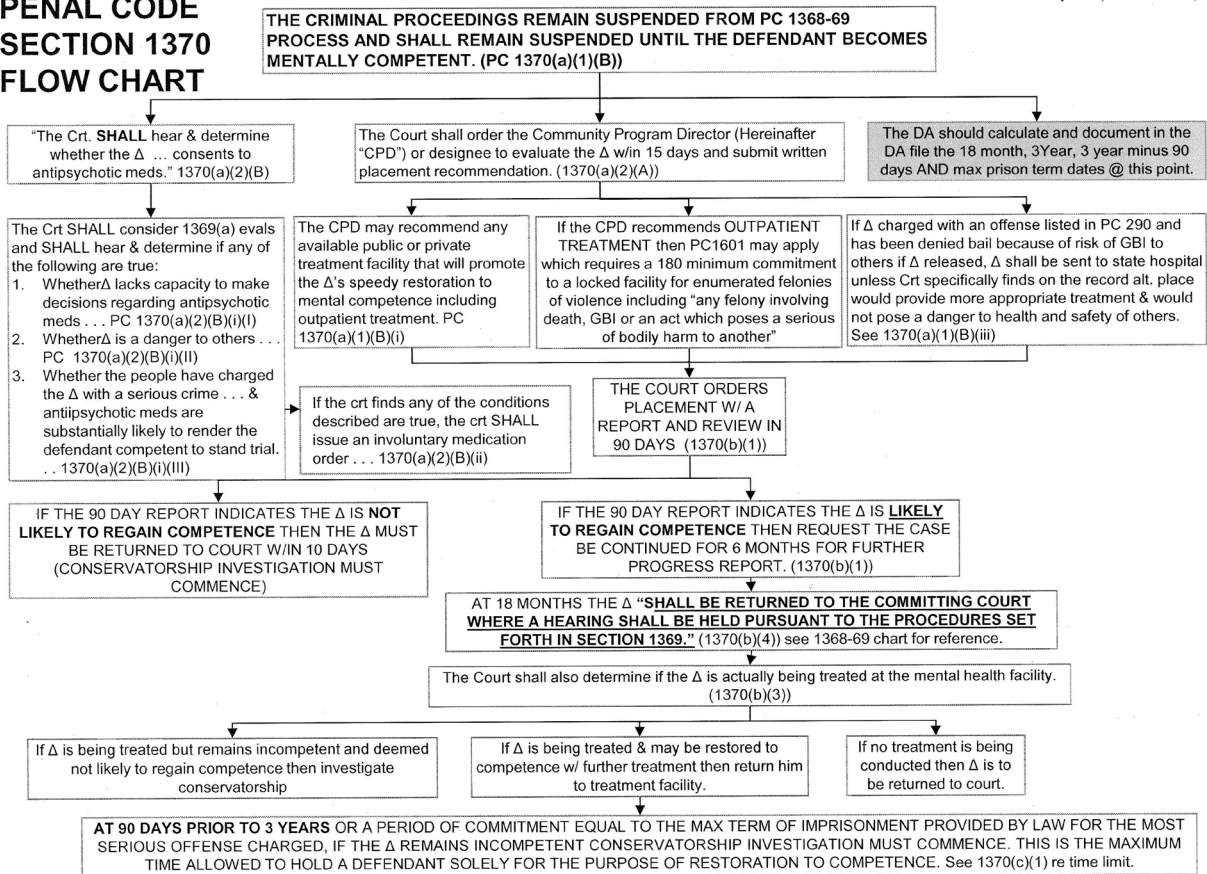
# Pursuant to 1368 and 1369 of the Penal Code

Drafted by LDL (revised 1/2015 LDL)



**PENAL CODE  
SECTION 1370  
FLOW CHART**

Drafted by LDL (revised 1/2015)



## **II. Juvenile Proceedings**

### **Welfare and Institutions Code Section 790** (SB 838) (Audrie's Law)

The amendments to this section add the following crimes to the list of offense for which a minor may not participate in deferred entry of judgment: rape, sodomy, oral copulation, or sexual penetration, where the victim is prevented from resisting due to unconsciousness caused by any intoxicating, anesthetizing or controlled substance, or when the victim was incapable of consenting due to a mental disorder or developmental or physical disability. (W&I Code, §790(a)(7).

Note: These offenses are still not Section 707(b) offenses. 707(b) contains a list of most, but not all, of the violent and serious felonies that would normally be strikes in adult court.

### **Welfare and Institutions Code Section 676** (SB 838) (Audrie's Law)

This amendment permits the juvenile proceedings to be open to the public in cases of rape, sodomy, or oral copulation when the victim is prevented from resisting due to being rendered unconscious by an intoxicating, anesthetizing or controlled substance, and those cases where the victim is prevented from resisting due to incapacity or disability. (W&I Code, §676(a)(4)(5)(6)

However, if requested by the victim, the prosecutor can make a motion for a closed hearing. (W&I Code, §676(b)(1).

### **Welfare and Institutions Code section 730** (SB 838) (Audrie's Law)

This amendment requires the court to order minors to complete a sex offender treatment program when the minor is adjudged a ward of the court by for commission of rape, sodomy, oral copulation or sexual penetration, "if the court determines in consultation with the county probation officer, that suitable programs are available." (W&I Code, §730(d).

### **Welfare and Institutions Code Section 786** (SB 1038)

1. This new provision provides for the automatic sealing of juvenile court records pertaining to non 707(b) offenses. It requires the court to order a petition dismissed and to seal all records in the custody of the juvenile court pertaining to the dismissed petition if a minor (1) completes an informal program of supervision pursuant to W&I 654.2 (informal supervision without a declaration of wardship); or (2) completes probation under W&I 725 (formal probation supervision without a declaration of wardship); or (3) completes a term of probation for any offense not listed in W&I 707(b). (W&I Code, §786

2. The amendment provides that the prosecuting attorney and the probation department shall have access to the sealed juvenile record for the limited purpose of determining whether the minor is eligible for deferred entry of judgment under W&I 790.

Note: Section 786 says nothing about prosecutor or probation department records. Welfare & Institutions Code section 781 continues to permit the filing of a petition to seal a non-W&I 707(b) record five years or more after the jurisdiction of the juvenile court has terminated,

or, in a case where no petition was filed, five years after being taken before a probation officer, or at any time after reaching 18. Sealing pursuant to a W&I 781 specifically includes an order that agencies in addition to the court seal their records.

**Welfare and Institutions Code Section 601(b) (SB 1296)**

The amendment to W&I section 601(b) prohibits holding a minor in a secure facility if the minor has been found in contempt for failing to comply with a court order regarding truancy. Thus, if a minor is on probation for truancy and refuses to go to school, courts can no longer commit those minors to juvenile hall, camp or any other secured placement.

**Welfare and Institutions Code Sections 635, 636 (AB 388)**

The amendments provide that in deciding whether or not to detain a minor who has committed a crime, the court's decision to detain shall not be based on the minor's status as dependent child of the court (W&I 300) or the child welfare service department's inability to provide a placement for the minor. (W&I 636(b)(2), (c)(2); 636(a))

**Welfare and Institution Code Sections 730.6 (AB 388)**

If the direct victim of a crime is a group home or other facility licensed to provide residential care in which the minor was placed as a dependent child of the court or a ward of the court, or if the direct victim is an employee of such a facility, the amount of restitution is limited to out-of-court expenses that are not covered by insurance and that are paid by the facility or the employee. (W&I 730.6(k)).

**III. Human Trafficking**

**Penal Code sections 1335 and 1337 (AB 1610)**

1. This legislation was sponsored by the Alameda County District Attorney's Office. It amends Penal Code sections 1335 and 1337, which provides for conditional examination of witnesses, by adding human trafficking (Penal Code section 236.1) to the offenses for which conditional examinations are authorized [The other statutes for which conditional examinations are authorized are domestic violence, Penal Code section 1192.7(c) serious felonies, and violations of Health and Safety Code section 11351, 11352, 11378 and 11379.]

2. The conditional examination is authorized in two circumstances in which the defendant is charged with human trafficking:

Sec. 1335(c)(1): "If . . . there is evidence that the victim or material witness has been or is being dissuaded by the defendant or a person acting on behalf of the defendant, by intimidation or physical threat, from cooperating with the prosecutor or testifying at trial, the People or the defendant may, if the defendant has been fully informed of his or her right to counsel as provided by law, have a witness examined conditionally."

Sec. 1335(c)(2): “If . . . the court finds that there is a reasonable basis to believe that the material witness will not attend the trial because he or she is under the direct control of the defendant or another person involved in human trafficking seeks to prevent the witness or victim from testifying, and if the defendant has been fully informed of his or her right to counsel as provided by law, have a witness examined conditionally.”

3. Section 1337 provides that the supporting affidavit must include the above information.

**Penal Code section 629.52 (SB 955)**

This amendment adds human trafficking to the list of crimes for which a wiretap may be obtained. [Other crimes include the sale, transportation or manufacturing of illegal drugs, murder; solicitation to commit murder; kidnapping under P.C. 209; gang crimes; crimes involving weapons of mass destruction.]

**Penal Code section 784.7(c) (SB 939)**

1. The former venue section (Penal Code section 784.8) had permitted human trafficking violations that occur in multiple jurisdictions involving the same victim or victims to be tried in any jurisdiction where at least one offense occurred. This section has been repealed.

2. Under the amendment to Penal Code section 784.7(c) the requirement that the human trafficking offenses involve the same victim or victims is deleted.

3. Section 784.7 states that at the hearing pursuant to Penal Code section 954, the prosecution shall present written evidence that all district attorneys in counties with jurisdiction of the offenses agree to venue.

**Penal Code section 1203.49 (AB 1585)**

1. This is a new statutory provision which permits a defendant convicted of prostitution or solicitation under Penal Code section 647(b) to petition the court for specified relief.

2. If the defendant can establish by clear and convincing evidence that that conviction was the result of his or her status as a victim of human trafficking, the court may issue an order that does the following things:

(a) sets forth a finding that the defendant was a victim of human trafficking when the crime was committed;

(b) order any relief described in Penal Code section 1203.4 (which provides for dismissal and relief from other penalties)

(c) notify the Department of Justice that the defendant was a victim of human trafficking.

3. This Assembly bill also amended Penal Code section 11105 so that convictions for which the relief has been granted cannot be disseminated by the Department of Justice to authorized agencies or organizations seeking this information for employment, licensing or certification purposes.

**Penal Code section 647(m) (SB 1255)**

1. This amendment increases the punishment for a violation of Penal Code section 647(b) when the person solicited by the defendant was a minor or the defendant knew or should have

known the person was a minor. The punishment is increased to a minimum of two days in jail and a maximum of one year in jail and/or a fine up to \$10,000.

2. The court may, in unusual cases, when the interests of justice are best served, reduce or eliminate the mandatory two days in county jail, but the court must specify its reasons for doing so on the record.

### **Evidence Code section 782.1 (AB 336)**

1. This new Evidence Code section creates a procedure for the introduction into evidence by the prosecution of condom possession by a defendant in cases involving Penal Code section 647 or Penal Code section 653.22 (loitering with intent to commit prostitution.)

{According to legislative history of this bill, the Legislature was concerned that “sex workers” are deterred from carrying condoms because they fear condoms will be used as evidence against them, and thus workers do not engage in safe sex.}

2. This Evidence Code provision provides that if the prosecution intends to introduce the possession of one or more condoms in evidence, the following procedure must be followed:

(a) a written motion must be made by the prosecutor stating that the prosecutor has an offer of proof of the relevancy of the possession of condoms by defendant;

(b) the written motion must be accompanied by an affidavit with the offer of proof and the affidavit must be filed under seal and only unsealed by the court in determining the sufficiency of the offer of proof.

(c) if the court finds the evidence relevant and not inadmissible under section 352, the court may make an order stated what evidence may be introduced by the prosecutor.

(d) the affidavit must be resealed by the court and remained sealed unless the defendant raises an issue on appeal.

## **NEXT WEEK: People v. Whitmer: The California Supreme Court revisits the Bailey doctrine**

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist. Atty computer banks.