

#63(L)

8/4/66

First Supplement to Memorandum 66-50

Subject: Study 63(L) - The Evidence Code (Penal Code Revisions)

We have received the comments of the district attorneys concerning the proposed amendments of Penal Code Sections 1093 and 1127. They object to the amendments and suggest that the right to comment of the defendant's failure to explain or deny by his testimony any evidence in the case against him should exist where the defendant testifies. See Exhibit III to Memorandum 66-45. (Both letters object to the proposed revision;)

You will recall that in People v. Ing, mentioned in the basic memorandum, the District Court of Appeal took a view consistent with the view advocated by the district attorneys. The Supreme Court has granted a hearing in this case.

Despite the fact that a joint legislative committee is now engaged in drafting a new Penal Code, the Commission undertook to revise Sections 1093 and 1127 in order to eliminate the unconstitutional right to comment under those sections. We can not be sure as to the extent to which the right to comment will be permitted where the defendant testifies. We would be reluctant to provide any right to comment in the statute for that would require us to anticipate what the California Supreme Court and the United States Supreme Court will ultimately hold on this matter.

There appear to be two choices available. First, determine not to submit a recommendation on revision of Sections 1093 and 1127. It is unlikely that it would be adopted in its present form by the Legislature in view of the objections of the district attorneys and the fact that a joint legislative committee is now working on the subject. Second,

revise the two sections to provide a right of comment "to the full extent permitted under the United States Constitution." This would preclude erroneous comment when the defendant does not testify. However, we should recognize that it is extremely unlikely that any court is unaware of the constitutional limitations on the right to comment and we can not make a very strong case that the amendment is essential.

Respectfully submitted,

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