

Memorandum 84-16

Subject: Study M-100 - Statutes of Limitation for Felonies (Possible Changes in Commission Recommendation)

Under existing law, the basic limitation period for felonies is three years after commission of the crime, with a six-year period for certain sex offenses, no limitation period for murder, kidnapping, and a few unrelated crimes, and tolling of the limitation period until the time of discovery of certain concealed crimes. The Commission's recommendation is to make a uniform period of six years for all felonies regardless of time of discovery, but there would be no limitation period for crimes punishable by death or life imprisonment. The recommendation is set in type but has not yet been printed.

The Commission's recommendation has not been well-received by either prosecution or defense. The prosecution's basic problem is that concealed crimes should not be subject to an absolute limitation period, and that the tolling feature of existing law must be preserved. The defense position is that a general six-year limitation period is too long and will make it difficult to adequately defend cases. There is not a general feeling in Sacramento that the Commission's recommendation is acceptable, in light of this situation. The article attached as Exhibit 1, Freeman, A Question of Time, California Lawyer 32 (January 1984), we believe accurately reflects the current attitude towards the Commission's proposal. The Commission should review its recommendation to see whether it wishes to make any changes to make it more useful to the Legislature.

The staff sees some relatively simple ways the Commission could revise the recommendation to make it politically more acceptable and yet still inject some rationality into existing law. This would involve basically giving up the ambitious scheme of a single six-year limitation period and keeping the existing scheme of three years with tolling for fraud and public official crimes, but systematizing the existing categories. The revised recommendation would then provide:

(1) No limitation period for crimes punishable by death or life imprisonment. This would not change the Commission's original recommendation.

(2) A six-year limitation period for all crimes to which the six-year limitation period currently applies (serious sex crimes), with the exception of acceptance of a bribe by a public official, which would be moved down to the category of public official crimes. Voluntary and involuntary manslaughter should also be included in the six-year category; they are currently classed with fraud and public official crimes.

(3) A limitation period of three years after discovery of the crime in the case of fraud and public official crimes, using the standard of the Model Penal Code. In addition, the crimes currently subject to this limitation period would be expressly listed in the statute (with the addition of acceptance of a bribe by a public official, embezzlement of public money, and falsification of public records), in order to avoid litigation over what specific crimes fall into this category.

(4) The limitation periods would not be tolled during the time the defendant is outside the jurisdiction. This would not change the Commission's original recommendation; in such a case the limitation statute could be satisfied by issuance of an arrest warrant for the defendant.

(5) The acts that constitute satisfaction of the limitation statute, in addition to issuance of an arrest warrant, would be clarified. This would not change the Commission's original recommendation.

(6) Treatment of lesser included offenses, enhancements, and variable prison terms for purposes of categorization of crimes would be clarified. This would not change the Commission's original recommendation.

(7) The changes in the law would be made retroactive to the extent practical. This would not change the Commission's original recommendation.

These changes would require very little departure from the draft already prepared for the Commission. A revised draft is set out in Exhibit 2, together with revised Comments showing the disposition of existing law.

There is one other feature the staff believes the Commission should seriously consider. The staff is not comfortable with the six-year category of sex crimes, since that category is arbitrary and offers no systematic basis for future development of the law. Professor Uelmen in his study for the Commission suggests what the staff believes to be a more satisfactory approach--a six-year limitation period would be imposed on the more serious felonies, seriousness being determined by the penalty imposed. If felonies for which the maximum punishment is eight years or more were subject to a six-year limitation period, this category would

then include all the existing six-year crimes except acceptance of a bribe (which we would put in the concealed crime category), and sodomy or oral copulation of an unconscious victim. The following felonies would also be extended to the six-year category: arson causing bodily injury, explosion of destructive device with intent to murder or causing bodily injury, attempting a crime punishable by life imprisonment, assault with a firearm upon a peace officer or fireman engaged in performance of duties, and voluntary manslaughter and vehicular manslaughter involving drunk driving and gross negligence (penalty increased effective January 1, 1984). To accomplish this change, Section 800 (felonies subject to six-year limitation period) would be revised to read:

§ 800. Felonies subject to six-year limitation period

800. Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more must be commenced within six years after commission of the offense.

Comment. Section 800 supersedes subdivision (b) of former Section 800. Section 800 applies to the same crimes as the former provision, with the exception of a violation of Section 286(f) or 288a(f), which are governed by Section 801 (felonies subject to three-year limitation period), and acceptance of a bribe by a public official or a public employee, which is governed by Sections 801 (felonies subject to three-year limitation period) and 803 (tolling of limitation period).

Section 800 also applies to the following crimes, formerly subject to a three-year limitation period: arson causing bodily injury (Section 451), explosion of destructive device with intent to murder, or causing bodily injury (Sections 12308-12309), attempting a crime punishable by life imprisonment (Section 664), assault with a firearm upon a peace officer or fireman engaged in performance of duties (Section 245(c)), and voluntary manslaughter and vehicular manslaughter involving drunk driving and gross negligence (Section 193).

Although this would change a few aspects of existing law, the staff believes the changes are not unreasonable and would help bring some rationality into the six-year limitation category.

A table showing the changes that would be made by the staff proposals is set out in Exhibit 3.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

A Question of Time

EXHIBIT 1

By Martha Freeman

Should the statute of limitations be lengthened and simplified? The answer depends on whom you talk to

So meticulous was rapist Melvin Carter that it took the law 10 years to catch up with him. By that time, according to court documents, he had committed as many as 100 rapes throughout Northern California. Noting the physical evidence against him and saying he wanted to clear his conscience, Carter pleaded guilty to 23 counts of rape and attempted rape, and confessed to other assaults for which he could not be tried because the statute of limitations had run. Carter was sentenced to 25 years in prison. His attorney, Thomas J. Nolan of Nolan & Parnes in Palo Alto, observed, "The statute of limitations did not prevent society from doing what it wanted with my client."

The statute of limitations so seldom enters into criminal proceedings that attorneys consider the current debate over reform to be academic. Yet when the statute does impinge on a criminal case, its effect is usually critical. Not only can it dramatically increase pre-trial litigation; it sometimes bars prosecution entirely.

One of Carter's victims, whose assault was too old to prosecute, says the statute of limitations acted as an accomplice in the offense. She told the *Peninsula Times Tribune* early in 1981, "I will always know that in an official way, he

Sexual Crimes
Criminal Crimes

Assemblyman

got away with (it). I don't like that."

She took her grievance to Assemblyman Byron Sher (D-Palo Alto), chairman of the Criminal Law and Public Safety Committee. He responded by introducing legislation to increase the statute of limitations on sexual assault from three years to five years. Sher's bill (AB 303) was joined with three related Senate bills and passed during the 1981-82 legislative session, increasing to six years the statute of limitations for a host of sex crimes.

The California criminal statute of limitations (Pen C §§799-803), first enacted in 1872, now provides a three-year limit for most felonies (§800(a)), a six-year limit for 10 sex crimes, including rape, and for acceptance of a bribe by a public official (§800(b)), and no limit for murder, embezzlement of public funds, falsification of public records and kidnapping (§799). The statute for 15 crimes begins running with discovery rather than commission and among the crimes are conflict of interest, offering or preparing false evidence, grand theft, manslaughter and several varieties of fraud (§800(c)).

Because Sher's bill was the 11th since 1969 to alter the time limits for prosecution of certain felonies, Sher included in AB 303 a provision asking the California Law Revision Commission to look into "the rationales for the

statutes of limitations for various felonies and the justification for the revision of the period of limitations for specific crimes or categories of crime, and . . . make recommendations to the Legislature based on the study." Stats 1981, ch 909, §3.

Because the task dealt with criminal law, it was an unusual one for the 10-member, Palo Alto-based commission, composed of seven gubernatorial appointees (mostly lawyers), one member from each house of the Legislature (currently Senator Barry Keene (D-Vallejo) and Assemblyman Alistair McAlister (D-Milpitas)), and the California legislative counsel, currently Bion Gregory. The commission turned to Gerald F. Uelman, a professor of criminal law at Loyola Law School in Los Angeles and an acknowledged expert on California's criminal statutes of limitation. Uelman prepared a 73-page report based in part on a survey of 70 prosecutors, defense attorneys and judges (15 *Pacific Law Journal* 35 (1983)). The report included recommendations similar to provisions in the Model Penal Code: that there be no limitation for capital crimes, that offenses punishable by prison sentences of more than nine years be given a six-year limit, and that the limit for all other felonies be three years. Uelman also recommended that the statute for certain types of fraud, embezzlement and official miscon-

A question of time

duct commence on discovery rather than commission of the crime.

The Commission rejected Uelmen's suggestion that felonies be categorized according to the length of the prison sentence, preferring to base the time limit for prosecution solely on the seriousness of the offense. They reasoned that the Legislature had relied on factors other than seriousness in setting sentences. The commission also rejected tolling for any reason, wishing to eliminate the pre-trial litigation that tolling controversies usually provoke.

'A reasoned approach'

The commission formally recommended a six-year statute of limitations for most felonies, elimination of tolling for any reason, and no limitation for capital crimes and crimes punished by life in prison, with or without possibility of parole. (They also recommended that the limit for misdemeanors remain unchanged at one year from the date of the crime.) David Rosenberg, chairman of the Law Revision Commission and a partner in the Sacramento firm of Felderstein, Rosenberg & McManus, calls the recommendations "a reasoned approach" which will reduce the money and time spent on criminal cases. The commission is urging the introduction of its recommendations to the Legislature as an indivisible package, saying it will not support a piecemeal legislative approach.

The commissioners may be convinced of the need for comprehensive change, but many lawyers are not. Former Chief Deputy State Public Defender Charles Sevilla in San Diego—now working for the federal defenders office—opposed the proposal at a hearing before the commission last September. "The statute of limitations serves its function now," he says. "My impression is that for us in the trenches, there is no problem with it. The burden of showing there is a problem ought to be on those who want to change the law. Once you get a feel for the oscillating nature of the Penal Code—with hundreds of changes being made—you don't want to change something that already works."

Even Steve White, former executive director of the California District Attorneys' Association (CDAA) and a supporter of the recommendations, says, "We're not crying out for repeal of the current law."

Once in awhile a criminal suspect is able to avoid prosecution because the

statute of limitations has run. One of the most notorious cases is that of the "stinky" rapist in Berkeley, who was apprehended after the statute ran on dozens of rapes he is accused of committing in the mid-1970s. Many more criminals are like Melvin Carter, however: They keep at it long enough to be charged with some of their crimes even if the statute has run on others.

'We don't want to file cases that are so old the witnesses can't remember.'

Moreover, regardless of statutory limits, prosecutors are reluctant to bring charges in old cases. "We don't want to file cases that are so old the witnesses can't remember," says White, who was a prosecutor for five years in Sacramento County before going to CDAA in 1979, and now directs the criminal division of the state attorney general's office. "We evaluate each case on its individual merits. If we had a suspect in a seven-year-old burglary, chances are we wouldn't file even if we could." White says that even the victims in old cases usually are not eager to testify. "The burglary that was very traumatic at the time fades after a while. Victims of violent crimes are sometimes reluctant to relive the experience after many years have passed."

Sometimes, however, the evidence is so good and the crime so serious that the statute does become significant. White had a close call with the statute of limitations in 1978 in a rape case he eventually won. The rapist was unknown until the day before the statute ran, when he was identified through a fingerprint. At the time, without a suspect under arrest, a grand jury indictment was needed to commence prosecution before the time ran out. White recalls that he asked the judge to convene the grand jury that night. "Just for one case?" asked the judge. White replied, "Your Honor, tomorrow this rapist will be a free man."

Time turns facts to 'shining ether'

Given its potential for granting amnesty to serious offenders, why have a statute of limitations at all? Uelmen identifies three reasons: The first, and by all accounts the least significant, is to prevent dallying by law enforcement. Even

defense attorneys admit this is seldom a problem. The prosecution recognizes the truth of Ralph Waldo Emerson's observation that "time turns to shining ether the solid angularity of facts," says Sevilla. "The public demands the earliest possible resolution; that's the major motivation."

Constitutional and statutory guarantees of due process and speedy trial further encourage police and prosecutors to get on with it. When they do not, courts balk, even when the statute of limitations has not run. An example is the Marin County case of *People v Benjamin* (Marin Super Ct No. 7755) in which 17 members of the Synanon Church were charged with kidnapping and assault. Originally, county authorities decided not to prosecute "because they didn't have enough evidence, and the victims weren't all that interested," says attorney Nolan, who represents the church. The day before the statute ran, however, then-Attorney General George Deukmejian indicted the Synanon leaders. Citing a lack of speedy prosecution, the superior court dismissed the case, but Deukmejian appealed the ruling and the case is pending.

The due process issue rests on two tests: whether the pre-arrest delay was justified and whether it prejudiced the defendant's case. In a 1978 case involving a defendant who left the state after committing a burglary and was not charged until nine years later (*Scherling v Santa Clara Superior Court* (22 C3d 493, 149 CR 597)), the state Supreme Court examined law enforcement's investigative procedures and the defendant's claim of prejudice. The court determined that the delay in the arrest was justifiable and was not for the purpose of prejudicing the defendant's case. The court then examined the evidence presented at trial, as well as the significance of the evidence that the defense claimed it had lost as a result of the delay, and found no prejudice. The court noted that witnesses were available to testify on all issues raised at trial.

Although the U.S. Supreme Court has been reluctant to apply the Sixth Amendment right to a speedy trial to pre-arrest delays (see *United States v McDonald*, (1982) 456 US 1), the California Supreme Court has left open the possibility. In *Jones v Superior Court* ((1970) 3 C3d 734, 91 CR 578), a defendant accused of selling narcotics moved for dismissal because of a 19-month delay in his arrest. The California Supreme Court reversed the lower court and issued a writ of mandate to dismiss the charges. Writing for the majority, then-Chief Justice Donald Wright reasoned that if the statute of limitations precluded judicial inquiry into delays, it would mean the Legislature had

Martha Freeman is a free-lance writer living in Sonora.

set the standard required by the right to a speedy trial. "The judiciary," he wrote, "is the final arbiter of the meaning of the Constitutional guarantee."

Repose

Uelmen suggests that a second reason for a statute of limitations is found in the notion of "repose," the idea that society should bear enmity toward a miscreant only for a finite period. Most prison sentences, by the same reasoning, are not life terms. Repose is at work in district attorneys' offices every day when decisions are made about what cases are worth pursuing: Old burglaries are not; old murders are. Because murder is considered unforgivable, 49 states impose no statute of limitations on its prosecution. The exception is New Mexico, which has a 15-year limit.

The third reason is that time not only makes guilt harder to prove, it makes defense harder as well. "Think of yourself as an accused citizen trying to establish where you were at 10:45 on a night 10 years ago," says Sevilla. "It's hard to corroborate."

Presumably, these three reasons were in the minds of our California forefathers when they codified the statute of limitations in 1872. While the reasoning still applies, some of the specific provisions may not. The most popular reform recommended by the Law Revision Commission is the elimination of tolling for the time a suspect spends out of state after committing an offense (Pen C §802). It is not surprising that defense attorneys favor this change, for they generally favor shortening the prosecution period. But most prosecutors back it as well, happy to be rid of the difficulty of trying to prove in pre-trial proceedings how long a defendant was out of state.

"A suspect may not leave a trail," says Gregory Thompson, assistant chief deputy district attorney in Sacramento County. "He may have been registered to vote somewhere, but that only shows he was there for one election period. Mobility has outrun the statute. You had to cross the Sierra in a covered wagon when it was enacted, (but) there's nothing magic about the state line anymore."

In Uelmen's report to the commission, he wrote, "If a defendant changed his identity and concealed himself in another city but did not cross the state border, the statute would not be tolled. . . . It makes little sense to permit tolling without reference to the purpose of the absence, and to preclude tolling simply because a fugitive from justice stays within the state's borders."

But Associate Justice Stanley Mosk, writing for the majority of the California

Supreme Court in *Scherling*, expressed a different view of the significance of tolling for the time the defendant lived openly in Idaho. Mosk wrote, "It is not unreasonable to find that (the defendant) would have been a target of suspicion sooner if he had remained in California, thus his purported availability for prosecution is not sufficient to fulfill the purpose underlying Sec. 802." 22 C3d at 493.

'Riddled with inconsistencies'

If the provision for tolling time out of state seems to have outlived its usefulness, it may be ripe for repeal, whether or not the commission's other recommendations are enacted. But of course, this kind of piecemeal change is just what Assemblyman Sher sought to prevent. "The current statutes," Uelmen wrote in the introduction to his study, "resemble a patchwork crazy quilt, riddled with inconsistencies. . . . Many (of the amendments that altered it) were responses to widely publicized cases in which the statute of limitations was a bar to prosecution."

The most popular reform is the elimination of tolling for time spent out of state.

Reasoning that many of the statute's inconsistencies were a result of second guesses about how long it takes to discover, investigate and prosecute various types of crimes, the commission chose not to take that approach. Its proposed six-year limit is intended to take into account the possibility that a suspect might elude authorities by leaving California, or that a particular crime might not be discovered until long after its commission. Popular or not, the commission's recommendations have the undeniable force of simplicity, and the commissioners have said they would oppose legislation that both increased the basic limitation to six years and included tolling provisions.

The elimination of tolling until discovery of crimes that are easily concealed is firmly opposed by most prosecutors. Sacramento's Thompson calls it an "olly-olly-oxen free" for embezzlers, because embezzlement "is so easy to perpetrate, and it's secret by nature. I think we want

to send a message that we'll catch up with an embezzler," says Thompson. For that reason alone, the CDAA will oppose the council's recommendation as it is written, White says.

Defense attorneys have a different reason for attacking the recommendations. Jeff Brown wrote to the commission as president of the California Public Defenders' Association, "It is our feeling that the filing of cases in excess of three years will make it difficult if not impossible for defendants to defend themselves." He argued that the courts would "probably" throw out a five- or six-year-old case on due process and speedy trial grounds, but only after the issues had been litigated. "People (involved) in trials can't eat, can't sleep; their love life goes to hell. It's not something you want to put someone through," he says.

Although Brown, public defender for San Francisco, largely discounts the statute of limitations as a motivator for law enforcement, he says he believes increasing it is "the wrong signal to send. The statute of limitations should say we expect efficiency and promptness."

In light of the negative responses from both defenders and prosecutors, it is unlikely that the council's recommendation, as such, will be introduced as a bill. But Edgar A. Kerry, chief counsel to the Assembly Criminal Law and Public Safety Committee, says he expects Sher to introduce some type of reform legislation in January. "Simplicity is important," says Kerry, who will play a key role in drafting the bill, "but it's not the only issue. The people who apply these provisions are not neophytes. That a proposal may be difficult for the average person to grasp doesn't mean it's not good."

Kerry calls it "extremely naive" of the commission to refuse to support reform legislation unless it is identical to its proposal. "Folks of all different persuasions come up here (to lobby); and this body can't wait a month until the commission meets again, then another month for new recommendations," he says.

The Law Revision Commission has spent two years studying an issue few people think is important, and drafting a recommendation that almost certainly will not become law. If it sounds like a waste of time and effort, it was not. In the rare cases in which the statute of limitations is a factor in criminal investigation and prosecution, it is a crucial one. The work done by Uelmen and the commission is the first and only comprehensive study of California's statute. Whatever the immediate result, the groundwork has been laid for rationalizing what has been an arbitrary and inconsistent segment of California's Penal Code. □

EXHIBIT 2

An act to repeal Chapter 2 (commencing with Section 799) of Title 3 of Part 2 of, and to add Chapter 2 (commencing with Section 799) to Title 3 of Part 2 of, the Penal Code, relating to crimes.

The people of the State of California do enact as follows:

32718

Penal Code §§ 799-803 (repealed)

SECTION 1. Chapter 2 (commencing with Section 799) of Title 3 of Part 2 of the Penal Code is repealed.

Comment. Former Sections 799 to 803 are replaced by new Sections 799 to 806, governing the time of commencing criminal actions.

Note. For the text of the former sections, and Comments indicating their disposition, see Appendix.

32720

Penal Code §§ 799-806 (added)

SEC. 2. Chapter 2 (commencing with Section 799) is added to Title 3 of Part 2 of the Penal Code, to read:

CHAPTER 2. TIME OF COMMENCING CRIMINAL ACTIONS

§ 799. Crimes not subject to limitation period

799. Prosecution for an offense punishable by death or by imprisonment in the state prison for life or for life without possibility of parole may be commenced at any time.

Comment. Section 799 replaces former Section 799 with the rule that there is no limitation period for capital crimes or for crimes punishable by life imprisonment (with or without the possibility of parole). This rule preserves former law as to murder (Section 187) and kidnapping for ransom (Section 209). See former Section 799.

Section 799 extends the limitation period for treason (Section 37), procuring execution by perjury (Section 128), train wrecking (Sections 218, 219), assault with a deadly weapon by a life term prisoner (Section 4500), bombing resulting in death or bodily injury (Section 12310), and making defective war materials that cause death (Military and Veterans Code Section 1672). These crimes are punishable by death or life imprisonment and therefore are subject to no limitation period under Section 799. Under former law they were subject to a three year limitation period. See former Section 800(a).

Section 799 reduces the limitation period for embezzlement of public moneys (Section 424) and falsification of public records (Government Code Section 6200). These crimes are not punishable by death or life imprisonment and therefore are not subject to Section 799; they are subject to a three-year limitation period under Section 801 (three-year limitation period for felonies), which is tolled until discovery of the crime. Section 803 (tolling of limitation period). Under former law they were subject to no limitation period. Former Section 799.

A crime punishable by death or by life imprisonment (with or without parole) is a crime for which the maximum penalty that may be imposed is death or life imprisonment (with or without parole), disregarding enhancement of the penalty in the case of an habitual offender. See Section 805 (classification of offenses).

30181

§ 800. Felonies subject to six-year limitation period

800. Prosecution for the following offenses must be commenced within six years after commission of the offense:

- (a) A violation of Section 261, 264.1, 288, or 289.
- (b) A violation of subdivision (c), (d), or (f) of Section 286.
- (c) A violation of subdivision (c), (d), or (f) of Section 288a.
- (d) Voluntary manslaughter or involuntary manslaughter.

Comment. Section 800 continues the substance of subdivision (b) of former Section 800, with the exception of acceptance of a bribe by a public official or public employee (Sections 68, 85, 93, 165; Elec. Code § 29160), which is governed by new Sections 801 (felonies subject to three-year limitation period) and 803 (tolling of limitation period). Section 800 also includes voluntary and involuntary manslaughter (Section 192), formerly governed by a limitation statute of three years after discovery. Former Section 800(c).

31503

§ 801. Felonies subject to three-year limitation period

801. Except as provided in Sections 799 and 800, prosecution for an offense punishable by imprisonment in the state prison must be commenced within three years after commission of the offense.

Comment. Section 801 continues the substance of former Section 800(a), which provided a limitation period of three years applicable to all felonies not otherwise dealt with expressly. Section 801 does not apply to capital crimes or crimes punishable by life imprisonment, for which there is no limitation period (Section 799), or to specified felonies subject to a six-year limitation period (Section 800). In addition, the three-year limitation period of Section 801 is tolled until discovery of crimes involving fraud or public officials (Section 803).

A crime punishable by imprisonment in the state prison within the meaning of Section 801 is a crime for which such imprisonment is the maximum penalty that may be imposed, disregarding enhancement of the penalty in the case of an habitual offender. See Section 805 (classification of offenses). For determination of the time prosecution is commenced within the meaning of this section, see Section 804.

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§ 802. Misdemeanors and infractions subject to one-year limitation period

802. Prosecution for an offense not punishable by death or imprisonment in the state prison must be commenced within one year after commission of the offense.

Comment. Section 802 continues the substance of former Section 801. Section 802 is applicable to misdemeanors and infractions. See Section 19d (infractions). An offense for which a misdemeanor complaint may be filed or that may be tried as a misdemeanor pursuant to Section 17(b)(4)-(5) is nonetheless an offense punishable by imprisonment in the state prison within the meaning of this section and therefore Section 801 (three-year limitation period for felonies) is the applicable statute of limitation. See Section 805 (classification of offenses). For determination of the time prosecution is commenced within the meaning of this section, see Section 804.

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§ 803. Tolling of limitation period

803. (a) Except as provided in this section, a limitation of time prescribed in this chapter is not tolled or extended for any reason, including but not limited to discovery of the commission of the offense or absence of the defendant from this state.

(b) No time during which prosecution of the same person for the same conduct is pending in a court of this state is a part of a limitation of time prescribed in this chapter.

(c) A limitation of time prescribed in this chapter is tolled until discovery of an offense punishable by imprisonment in the state prison a material element of which is fraud or breach of a fiduciary obligation or the basis of which is misconduct in office by a public officer, employee, or appointee, including but not limited to the following offenses:

(1) Grand theft, forgery, embezzlement of public money, falsification of public records, or acceptance of a bribe by a public official or a public employee.

- (2) A violation of Section 72, 118, 118a, 132, or 134.
- (3) A violation of Section 25540 or 25541 of the Corporations Code.
- (4) A violation of Section 1090 or 27443 of the Government Code.
- (5) Felony welfare fraud or Medi-Cal fraud in violation of Section 11483 or 14107 of the Welfare and Institutions Code.

Comment. Subdivision (a) of Section 803 supersedes former Section 802. If the defendant is absent from the state, the statute of limitations may be satisfied by issuing an arrest warrant. See Section 804 (commencement of prosecution).

Subdivision (b) continues the substance of former Section 802.5. The limitation of former Section 802.5 that permitted recommencing the same "criminal action" is replaced by a broader standard of prosecution for the "same conduct," drawn from Model Penal Code § 1.06(6)(b). The former law that provided tolling only for a subsequent prosecution for the same offense was too narrow, since the dismissal may have been based upon a substantial variation between the previous allegations and the proof. The test of the "same conduct," involving as it does some flexibility of definition, states a principle that should meet the reasonable needs of prosecution, while affording the defendant fair protection against an enlargement of the charges after running of the statute. It should be noted that subdivision (b) provides tolling only for a prosecution pending in state, not federal, court.

Subdivision (c) continues the substance of former Section 800(c), with the exception of voluntary and involuntary manslaughter (Section 192), which are governed by Section 800 (felonies subject to six-year limitation period). In addition, subdivision (c) includes embezzlement of public money (Section 424) and falsification of public records (Gov't Code §§ 6200-01) (formerly subject to no limitation period), and acceptance of a bribe by a public official or public employee (Sections 68, 85, 93, 165; Elec. Code § 29160) (formerly subject to a six-year limitation period). See former Sections 799 and 800(b).

045/163

§ 804. Commencement of prosecution

804. 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 with an inferior court charging a public offense of which the inferior court has original trial jurisdiction.
- (c) A case is certified to the superior court.
- (d) An arrest warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.

Comment. Subdivision (a) of Section 804 continues the substance of portions of former Sections 800, 801, and 802.5, and of former Section 803.

Subdivision (b) is drawn from former Section 802 (tolling while defendant out of state) and from Section 691(4) ("accusatory pleading" defined).

Subdivision (c) continues the substance of portions of former Section 800 (contingent version).

Subdivision (d) continues the substance of portions of former Sections 800 and 802.5, but adds the limitation that the warrant specify the name of the defendant or describe the defendant with particularity. Issuance of a "Doe" warrant does not reasonably inform a person that he or she is being prosecuted and therefore does not satisfy the statute of limitations. If the name specified in the warrant is not the precise name of the defendant, it is sufficient that the name identifies the defendant with reasonable certainty. See, e.g., *People v. McCrae*, 218 Cal. App.2d 725, 32 Cal. Rptr. 500 (1963); *People v. Erving*, 189 Cal. App.2d 283, 11 Cal. Rptr. 203 (1961). Cf. Sections 959(4), 960 (sufficiency of accusatory pleading). Nothing in subdivision (c) limits the constitutional due process and speedy trial requirements that the warrant be executed without unreasonable delay. See, e.g., *Jones v. Superior Court*, 3 Cal.3d 734, 478 P.2d 10, 91 Cal. Rptr. 578 (1970). It should be noted that "arrest warrant" includes a bench warrant within the meaning of this section. Ops. Cal. Atty. Gen. (No. 83-1208) (Aug. 3, 1983).

045/164

§ 805. Classification of offenses

805. For the purpose of determining the applicable limitation of time pursuant to this chapter:

(a) An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed. Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense.

(b) The limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense.

Comment. Section 805 clarifies the rules applicable in classifying offenses for the purpose of determining the relevant statute of limitation under this chapter.

Under subdivision (a), an offense is classified consistent with its maximum punishment. This continues the substance of former Section 801(b) (an offense for which a misdemeanor complaint may be filed or that may be tried as a misdemeanor pursuant to Section 17(b)(4)-(5) is subject to the felony statute of limitation). The punishment for an

offense is determined without regard to enhancements over the base term for the purpose of determining the relevant statute of limitation. Cf. §§ 666-668 (enhancement of punishment for habitual criminals). For the definitions of "base term" and "enhancement," see Rules of Court 405.

Subdivision (b) codifies the existing rule that the statute of limitation for a lesser included offense is the statute applicable to the lesser offense and not the statute applicable to the greater offense. See, e.g., *People v. Picetti*, 124 Cal. 361, 57 P. 156 (1899); *People v. Miller*, 12 Cal. 291 (1859).

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§ 806. Transitional provision

806. (a) As used in this section, "operative date" means January 1, 1985.

(b) Except as provided in subdivision (c), this chapter applies to an offense that was committed before, on, or after the operative date.

(c) This chapter does not apply, and the law applicable before the operative date does apply, to an offense that was committed before the operative date, if:

(1) Prosecution of the offense would be barred on the operative date by the limitation of time applicable before the operative date.

(2) Prosecution of the offense was commenced before the operative date.

Comment. Section 806 is intended to make this chapter applicable both prospectively and retroactively to the extent permissible and practical. Subdivision (c)(1) limits retroactive application that would have the effect of lengthening the statute of limitation to reflect the constitutional ex post facto prohibition where the statute of limitation has already run on the operative date. Subdivision (c)(2) precludes retroactive application that would have the effect of shortening the statute of limitation where prosecution under an operative statute has already begun on the operative date.

APPENDIX

EXISTING LAW AND ITS DISPOSITION

045/168

Penal Code §§ 799-803 (repealed)

CHAPTER 2. TIME OF COMMENCING CRIMINAL ACTIONS

799. There is no limitation of time within which a prosecution for murder, the embezzlement of public moneys, a violation of Section 209, or the falsification of public records must be commenced. Prosecution for murder may be commenced at any time after the death of the person killed. Prosecution for the embezzlement of public money, a violation of Section 209, or the falsification of public records may be commenced at any time after the discovery of the crime.

Comment. Former Section 799 is replaced by new Section 799. New Section 799 continues the rule that there is no limitation period for first degree murder or kidnapping for ransom and extends the rule to other capital crimes and crimes punishable by life imprisonment. New Section 799 does not continue the rule that there is no limitation period for embezzlement of public moneys or falsification of public records. These felonies are subject to a three-year limitation period that is tolled until discovery of the crime. New Sections 801 (felonies subject to three-year limitation period) and 803 (tolling of limitation period).

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800. (a) An indictment for any felony, except murder, the embezzlement of public money, or a violation of Section 209 of the Penal Code, and except as provided in subdivisions (b) and (c), shall be found, or an arrest warrant issued by the municipal or, where appropriate, the justice court within three years after its commission.

(b) An indictment for a violation of Section 261, 264.1, 288, or 289 of, or subdivision (c), (d), or (f) of Section 286, or subdivision (c), (d), or (f) of Section 288a, or for the acceptance of a bribe by a public official or a public employee, a felony, shall be found, or an arrest warrant issued by the municipal or, where appropriate, the justice court within six years after its commission.

(c) An indictment for grand theft, felony welfare fraud in violation of Section 11483 of the Welfare and Institutions Code, felony Medi-Cal fraud in violation of Section 14107 of the Welfare and Institutions

Code, forgery, voluntary manslaughter, or involuntary manslaughter, a violation of Section 72, 118, 118a, 132 or 134, of the Penal Code, Section 25540 or 25541 of the Corporations Code, or Section 1090 or 27443 of the Government Code, shall be found, or an arrest warrant issued by the municipal or, where appropriate, the justice court within three years after its discovery.

Comment. The substance of subdivision (a) of former Section 800 is continued in Section 801 (felonies subject to three-year limitation period).

The substance of subdivision (b) is continued in new Section 800 (felonies subject to six-year limitation period), with the exception of acceptance of a bribe by a public official or public employee, which is governed by new Sections 801 (felonies subject to three-year limitation period) and 803 (tolling of limitation period).

The substance of subdivision (c) is continued in new Sections 801 (three-year limitation period for felonies) and 803 (tolling of limitation period), with the exception of voluntary and involuntary manslaughter, which are governed by new Section 800 (felonies subject to six-year limitation period).

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801. (a) Except as provided in subdivision (b), an indictment for any misdemeanor shall be found or an information or complaint filed within one year after its commission.

(b) For an offense for which a misdemeanor complaint may be filed or that may be tried as a misdemeanor, pursuant to paragraphs (4) and (5) of subdivision (b) of Section 17, respectively, a complaint shall be filed within the time specified in Section 800 for such offense.

Comment. The substance of subdivision (a) of former Section 801 is continued in new Sections 802 (one-year limitation period for misdemeanors) and 804 (commencement of prosecution). The substance of subdivision (b) is continued in new Section 805 (classification of offenses).

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802. If, when or after the offense is committed, the defendant is out of the State, an indictment may be found, a complaint or an information filed or a case certified to the superior court, in any case originally triable in the superior court, or a complaint may be filed, in any case originally triable in any other court, within the term limited by law; and no time during which the defendant is not within this State, is a part of any limitation of the time for commencing a criminal action.

Comment. The language in former Section 802 permitting charges to be brought although the defendant was outside the state at the time of the offense is not continued. It is made unnecessary by Section 27 (persons punishable). The tolling provision of former Section 802 is not continued. See new Section 803 (tolling of limitation period). The statute of limitations may be satisfied as to a defendant outside the state by issuance of an arrest warrant. New Section 804 (commencement of prosecution).

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802.5. The time limitations provided in this chapter for the commencement of a criminal action shall be tolled upon the issuance of an arrest warrant or the finding of an indictment, and no time during which a criminal action is pending is a part of any limitation of the time for recommencing that criminal action in the event of a prior dismissal of that action, subject to the provisions of Section 1387.

Comment. The substance of former Section 802.5 is continued in new Sections 803(b) (tolling of limitation period) and 804 (commencement of prosecution).

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803. An indictment is found, within the meaning of this chapter, when it is presented by the grand jury in open court, and there received and filed.

Comment. The substance of former Section 803 is continued in new Section 804 (commencement of prosecution).

EXHIBIT 3

Changes Made by Staff Proposals

I

Under the staff draft, the existing limitation periods would be unchanged for all felonies and misdemeanors except as indicated below:

<u>Crime</u>	<u>Existing Limitation</u>	<u>Staff Draft</u>
Treason	3 years	None
Procuring Execution by Perjury	3 years	None
Train Wrecking Resulting in Death	3 years	None
Assault with Deadly Weapon by Life-Term Prisoner	3 years	None
Bombing Resulting in Death or Bodily Injury	3 years	None
Making Defective War Materials that Cause Death	3 years	None
Voluntary Manslaughter	3 years after discovery	6 years
Involuntary Manslaughter	3 years after discovery	6 years
Embezzlement of Public Moneys	None	3 years after discovery
Falsification of Public Records	None	3 years after discovery
Acceptance of Bribe by Public Official	6 years	3 years after discovery

II

In addition to the changes made by the staff draft, the following further changes would be made if a six-year limitation period were applied to all felonies punishable by eight or more years imprisonment:

<u>Crime</u>	<u>Existing Limitation</u>	<u>Further Change</u>
Arson Causing Bodily Injury	3 years	6 years
Explosion of Destructive Device with Intent to Murder or Causing Bodily Injury	3 years	6 years
Attempting Crime Punishable by Life Imprisonment	3 years	6 years
Assault with Firearm on Peace Officer or Fireman in Performance of Duties	3 years	6 years
Vehicular Manslaughter Involving Drunk Driving and Gross Negligence	3 years	6 years
Involuntary Manslaughter	3 years after discovery	3 years
Sodomy with Unconscious Victim	6 years	3 years
Oral Copulation with Unconscious Victim	6 years	3 years