Study J-1300 December 1, 1997

Memorandum 97-83

Trial Court Unification: Revision of Penal Code

The tentative recommendation on revision of the Penal Code for trial court unification under SCA 4 was circulated for comment in mid-September, with a comment deadline of November 21. Recipients included known interest groups and legislative committees.

We have received the following comments:

Exhibit pp.

1. Department of Justice 1
2. California Attorneys for Criminal Justice 5
3. Hon. Charles Patrick, San Diego Municipal Court 6

In addition, the Los Angeles Superior Court has reviewed the tentative recommendation and reports that it does not have any changes or additions to the proposals.

We will supplement this memorandum with any additional comments received before the December 12 Commission meeting, including discussion of the following issues:

(1) Treatment of change of venue motions in a unified superior court (in which judicial districts no longer exist).

(2) Treatment of pleadings and procedure in proceedings to remove a public official from office under Government Code Section 3060 (tried in the same manner as an indictment).

General Comments

The commentators recognize the difficulty of the revision task, and the intent generally not to disrupt existing criminal procedures but simply to continue the same procedures for the same types of cases in unified courts. The Department of Justice suggests it would be helpful to include a statement of this intent in appropriate comments to some of the revised sections. “This would help to prevent the revision from having unintended consequences.” Exhibit p. 4.

The staff agrees that, because of the potential for inadvertent error in a project of this sort, a statement of legislative intent could be helpful. As an example of the type of error that could creep in, see the discussion of Section 1007 (demurrers), below. While a Comment cannot override clear statutory language, it can help achieve the correct judicial construction in case of ambiguity. The staff would add intent language in the Comments to a few key provisions indicating what our endeavor is about, such as Sections 691 (definitions) and 1462 (municipal and superior court jurisdiction):

> The revision of this and other statutes to accommodate unification of the municipal and superior courts in a county is intended generally to preserve existing procedures for criminal cases by replacing references to superior court criminal cases with references to felony cases, and by replacing references to municipal court criminal cases with references to misdemeanor and felony cases.

Review of Rulings Made by Judge in Unified Court

California Attorneys for Criminal Justice point out the need to address a significant criminal procedure problem created by unification — a judge in a unified court could technically be assigned to review the judge's own preliminary rulings in a case. They suggest adding language to the statutes to the effect that, "All motions challenging rulings made by a judge at or before the preliminary hearing shall not be ruled on by the same judge who made the challenged rulings, unless agreed to by the parties." Exhibit p. 5.

The staff agrees that the policy articulated by CACJ is correct. It has been recognized by the Commission in its work on SCA 3, and is embodied in SCA 4. In fact, the tentative recommendation recognizes this principle in two places. Proposed Government Code Section 70212 (transitional provisions) would provide that, "Penal Code procedures that necessitate superior court review of, or action based on, a ruling or order by a municipal court judge shall be performed by a superior court judge other than the judge who originally made the ruling or order." In addition, the proposed revision of Penal Code Section 1538.5 (motion to return property or suppress evidence) includes this language in subdivision (m).

The staff agrees that the language is somewhat buried by its inclusion in Section 1538.5, since it is broader in scope than Section 1538.5. **We would move it to a new Section 859c, as suggested by CACJ**, along the following lines:

> Procedures under this code that provide for superior court review of a challenged ruling or order made by a superior court judge or a magistrate shall be performed by a superior court judge other than the judge or magistrate who originally made the ruling or order, unless agreed to by the parties.

While the CACJ suggestion limits such a provision to motions challenging rulings made at or before the preliminary hearing, the staff would not so limit it.

CACJ also would insert this language in Code of Civil Procedure Section 170.6, relating to disqualification of a judge for prejudice. While the staff agrees that an earlier ruling by the same judge is a form of "prejudgment", the prejudice provisions of Section 170.6 are not designed for this situation. We would not have a particular problem with a separate statute — say a new Section 170.63 (cf. Section 170.65, relating to a retired judge not qualified to hear criminal case). However, as a general drafting principle it is not a good idea to put the same provision in two different places. When one statute gets revised, the other is usually missed, inviting conflict in the law. **The staff thinks a single provision in the Penal Code is adequate and preferable.**

Penal Code § 597f (amended). Abandoned, sick, or disabled animal
Penal Code § 599a (amended). Warrants in humane cases
Penal Code § 4022 (amended). City jail

The Commission's definition of "judicial district" to mean the county (in a county in which there is no municipal court) makes the proposed amendments to Sections 597f, 599a, and 4022 unnecessary. **The staff will delete them from the draft.**

Penal Code § 691 (amended). Definitions

The tentative recommendation would replace Penal Code references to municipal court matters with references to misdemeanor and infraction cases, and superior court matters with references to felony cases. For this purpose, Section 691 would include definitions of the new terms. Judge Patrick believes the proposed language is ambiguous and potentially confusing; he suggests the following clarifications in the definitions:

> (f) "Felony case" means a criminal action in which a felony is charged and includes a criminal action in which a misdemeanor or infraction is ~~also~~ charged <u>in conjunction with one or more felonies</u>.

(g) "Misdemeanor or infraction case" means a criminal action in which a misdemeanor or infraction is charged ~~and does not include a criminal action in which a~~ but no felony is also charged.

The staff has no problem with language along these lines, although we would then further tinker with the language to maintain structural parallelism between the two subdivisions.

Penal Code § 859 (amended). Counsel for defendant

Our proposed revision of Section 859 includes revision of language in the section relating to delivery of a message to counsel for a defendant — "The magistrate must, upon the request of the defendant, require a peace officer to ~~take~~ transmit a message to any counsel whom the defendant may name, in the ~~judicial district~~ county in which the court is situated. The officer shall, without delay and without a fee, perform that duty." Judge Patrick, while recognizing that this matter is beyond the scope of the present study, would simply delete this language as archaic, with no application to today's real world.

The Commission has also pondered this language, and requested further research from the staff. The staff's research indicates that this language replicates a provision of the California Constitution, noted in the Comment to the section. Therefore we have limited our changes to conforming this language precisely to the present wording of the Constitution. **The staff believes it would be a mistake to intrude any further on this area of the law in the context of trial court unification.**

Penal Code § 860 (amended). Examination of case

The tentative recommendation revises Section 860 to accommodate unification and the resultant expansion of superior court jurisdiction to include misdemeanors and infractions:

860. At the time set for the examination of the case, if the public offense is

~~1. Not a felony, but within the jurisdiction of the superior court, or is~~

~~2. A~~ a felony punishable with death, or is

~~3. A~~ a felony to which the defendant has not pleaded guilty in accordance with Section 859a of this code, then, if the defendant requires the aid of counsel, the magistrate must allow the defendant a reasonable time to send for counsel, and may postpone the examination for not less than two nor more than five days for that

purpose. The magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case ...

Judge Patrick, while recognizing that this matter is beyond the scope of the present study, would take a more aggressive attitude towards the section, on the basis that, "The subject of counsel having been thoroughly covered in sections 859, 859a and 859b, it is unnecessary, confusing and redundant to again cover it in section 860."

> 860. At the time set for the examination ~~of the case, if the public offense is~~
> ~~1. Not a felony, but within the jurisdiction of the superior court, or is~~
> ~~2. A~~ a ~~felony punishable with death, or is~~
> ~~3. A~~ a ~~felony to which the defendant has not pleaded guilty in accordance with Section 859a of this code, then, if the defendant requires the aid of counsel, the magistrate must allow the defendant a reasonable time to send for counsel, and may postpone the examination for not less than two nor more than five days for that purpose. The magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears,~~ in accordance with Section 859b, the magistrate shall proceed to examine the case ...

The staff is reluctant to get into the matter of counsel in criminal proceedings without a careful study. **We could add this matter to our list of cleanup issues in judicial administration that appear appropriate for future study.**

Penal Code § 869 (amended). Report of examination

The tentative recommendation would make a technical change in Section 869(e):

> (e) The reporter shall, within 10 days after the close of the examination, if the defendant be held to answer the charge ~~in superior court~~ of a felony, or in any other case if either the defendant or the prosecution orders the transcript, transcribe his or her shorthand notes, making an original and one copy and as many additional copies thereof as there are defendants (other than fictitious defendants), regardless of the number of charges or fictitious defendants included in the same examination, and certify and deliver the original and all copies to the county clerk of the county in which the defendant was examined. The reporter shall,

before receiving any compensation as a reporter, file with the auditor of the county his or her affidavit setting forth that the transcript has been delivered to the county clerk within the time herein provided for. The compensation of the reporter for any services rendered by him or her as the reporter in any court of this state shall be reduced one-half if the provisions of this section as to the time of filing said transcript have not been complied with by him or her.

As long as we are amending Section 869, Judge Patrick would go further and eliminate "archaic language which is totally unnecessary":

> 869. ~~The testimony of each witness in cases of homicide shall be reduced to writing, as a deposition, by the magistrate, or under his or her direction, and in other cases upon the demand of the prosecuting attorney, or the defendant, or his or her counsel.~~ The magistrate ~~before whom the examination is had may, in his or her discretion, order the testimony and~~ shall require that the proceedings ~~to~~ be taken down in ~~shorthand in all examinations herein mentioned, and for that purpose he or she may appoint a shorthand~~ their entirety by a duly appointed reporter, or otherwise as provided by law. ~~The deposition or testimony of the witness shall be authenticated in the following form:~~
>
> ~~(a) It shall state the name of the witness, his or her place of residence, and his or her business or profession; except that if the witness is a peace officer, it shall state his or her name, and the address given in his or her testimony at the hearing.~~
>
> ~~(b) It shall contain the questions put to the witness and his or her answers thereto, each answer being distinctly read to him or her as it is taken down, and being corrected or added to until it conforms to what he or she declares is the truth, except in cases where the testimony is taken down in shorthand, the answer or answers of the witness need not be read to him or her.~~
>
> ~~(c) If a question put be objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question was overruled or the answer declined, shall be stated.~~
>
> ~~(d) The deposition shall be signed by the witness, or if he or she refuses to sign it, his or her reason for refusing shall be stated in writing, as he or she gives it, except in cases where the deposition is taken down in shorthand, it need not be signed by the witness.~~

The staff believes the whole issue of court reporters and reporting, particularly in a unified court, requires careful and thorough study. **We would hold the sort of revision proposed by Judge Patrick for future study.**

Penal Code § 949 (amended). First pleading by people

Section 949, as it would be amended in our tentative recommendation, reads as follows:

> 949. The first pleading on the part of the people in ~~the superior court~~ a felony case is the indictment, information, accusation, or the complaint in any case certified ~~to the superior court~~ under Section 859a ~~or the complaint filed in accordance with the provisions of Section 272~~. The first pleading on the part of the people in ~~all inferior courts~~ a misdemeanor or infraction case is the complaint except as otherwise provided by law.

Judge Patrick points out that replacing "superior court" with "felony case" here changes the meaning of the provision, since the first pleading in a felony case brought before a magistrate is the complaint. **The staff would address this problem by maintaining the superior court references** — "The first pleading on the part of the people in the superior court in a felony case is the indictment, information, accusation, or the complaint in any case certified to the superior court under Section 859a ..."

Penal Code § 977 (amended). Presence of defendant and counsel
Penal Code § 977.2 (amended). Pilot project

Judge Patrick draws our attention to the following italicized language in Sections 977(c) and 977.2(a)(2) — "However, if the defendant is represented by counsel at an initial hearing in superior court, *and if the defendant does not plead guilty or nolo contendere to any charge,* the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing." He finds this language puzzling and, while recognizing that it is beyond the scope of this study, would either clarify or delete it.

The staff would not tinker in this area.

Penal Code § 987.1 (amended). Representation by counsel

Judge Patrick would add the following bold-face revision to our other proposed revisions of Section 987.1:

> 987.1. Counsel at the preliminary examination shall continue to represent a defendant who has been ordered to stand trial for a felony until the date set for ~~his~~ arraignment **~~in superior court~~ on the**

information unless relieved by the court upon the substitution of other counsel or for cause.

The staff agrees an amendment along these lines would improve the draft, since in a unified court all activities will take place in the superior court. However, **the reference to the information probably not be added** (or else should be expanded to include an indictment).

Penal Code § 987.2 (amended). Compensation of assigned counsel

The amendment of Section 987.2(i) could create an implication of a new right to counsel in an infraction case:

> (i) Counsel shall be appointed to represent, in ~~the municipal or justice~~ court, a person charged with a misdemeanor or infraction who desires but is unable to employ counsel, when it appears that the appointment is necessary to provide an adequate and effective defense for the defendant.

To counteract such an implication, the Comment notes that the right to counsel in an infraction case is governed by Section 19.6.

Judge Patrick believes a Comment is insufficient, and that ambiguity on the issue must be removed by an express statutory reference to Section 19.6. **The staff agrees that a statutory reference to Section 19.6 along the following lines would be beneficial**:

> (i) Counsel shall be appointed to represent, in ~~the municipal or justice court~~ a misdemeanor case or, subject to Section 19.6, in an infraction case, a person who desires but is unable to employ counsel, when it appears that the appointment is necessary to provide an adequate and effective defense for the defendant.

Penal Code § 1007 (amended). Demurrer

The tentative recommendation replaces an existing reference to a demurrer in superior court with a reference to a demurrer in a felony case.

> 1007. Upon considering the demurrer, the court must make an order either overruling or sustaining it. If the demurrer is overruled, the court must permit the defendant, at ~~his~~ the defendant's election, to plead, which ~~he~~ the defendant must do forthwith, unless the court extends the time. If the demurrer is sustained ~~by a superior court~~ in a felony case, the court must, if the defect can be remedied by amendment, permit the indictment or information to be

> amended, either forthwith or within such time, not exceeding 10 days, as it may fix, or, if the defect or insufficiency therein cannot be remedied by amendment, the court may direct the filing of a new information or the submission of the case to the same or another grand jury. If the demurrer to a complaint is sustained ~~by an inferior court~~, the court must, if the defect can be remedied, permit the filing of an amended complaint within such time not exceeding 10 days as it may fix. The orders made under this section shall be entered in the docket or minutes of the court.

Both the Department of Justice and Judge Patrick point out that this revision could inadvertently include a felony *complaint* before a magistrate. To correct this, they both suggest that reference be made to an indictment or information, rather than to a felony. **The staff will make this correction.**

Penal Code § 1010 (amended). Dismissal due to defective or insufficient indictment or information

Penal Code § 1050 (amended). Expediting trial

Judge Patrick points out the same defects in the amendment of these sections as in the amendment of Section 1007 — the proposed amendment may inadvertently include felony cases that are still at the complaint stage; the provisions should be limited to indictments and informations. **The staff would make the suggested revision**; i.e., "When ~~a criminal action in the superior court~~ an indictment or information is dismissed after the sustaining of a demurrer ..."

Penal Code § 1203.1 (amended). Probation

Judge Patrick, while recognizing that this is beyond the scope of the present study, suggests that as long as we are amending Section 1203.1, we add language making clear that the following unrelated provision of subdivision (a) is limited to felonies and does not apply to misdemeanors:

> However, where the maximum possible term of the sentence is five years or less, then the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years. The following shall apply to this subdivision:
>
> (1) The court may fine the defendant in a sum not to exceed the maximum fine provided by law in the case.
>
> (2) The court may, in connection with granting probation, impose either imprisonment in a county jail or a fine, both, or neither.
>
> (3) The court shall provide for restitution in proper cases.

(4) The court may require bonds for the faithful observance and performance of any or all of the conditions of probation.

The staff thinks Judge Patrick is probably right on the intent of this provision, but **we do not think the Commission should start making gratuitous changes at this point**. Nearly every section we are touching in this project is susceptible to improvement unrelated to trial court unification. Where do we draw the line? And, without a careful study, the risk of error is substantial.

Penal Code § 1278 (amended). Form of undertaking
Penal Code § 1327 (amended). Form of subpoena

Our proposed draft revises several statutory forms to eliminate justice court references and replace them with superior court references. Judge Patrick suggests that the court references simply be left blank, allowing for insertion of "superior" or "municipal" as the case may be. **The staff thinks this is a fine idea and will implement it.**

Penal Code § 1281a (amended). Bail in felony cases

The existing section provides for release on bail by a municipal or justice court judge; we are deleting the reference to justice court judges, who no longer exist. Judge Patrick suggests that the municipal court judge limitation also be deleted, so that the section will provide for release on bail by any judge in the county.

While the staff does not see any particular harm in the suggested revision, **we are reluctant to start tinkering with the bail statutes**. It appears that the ability of any superior court judge to release a defendant on bail, whether or not the judge is in the county, is already covered by Section 1277.

Penal Code § 1309 (repealed). Unclaimed deposit

Judge Patrick agrees with the Commission's proposed repeal of this section. (The Commission had particularly invited attention to it in the tentative recommendation.)

Penal Code § 1462 (amended). Municipal and superior court jurisdiction

A key section in the draft revises municipal and superior court jurisdiction to account for trial court unification:

1462. (a) Each municipal ~~and justice~~ court shall have jurisdiction in all criminal cases amounting to misdemeanor, where the offense charged was committed within the county in which the municipal

~~or justice~~ court is established except ~~those of which the juvenile court is given jurisdiction and~~ those of which other courts are given exclusive jurisdiction. Each municipal ~~and justice~~ court shall have exclusive jurisdiction in all cases involving the violation of ordinances of cities or towns situated within the district in which the court is established.

(b) Each municipal ~~and justice~~ court shall have jurisdiction in all noncapital criminal cases to receive a plea of guilty or nolo contendere, appoint a time for pronouncing judgment under Section 859a, pronounce judgment, and refer the case to the probation officer if eligible for probation.

(c) The superior courts shall have jurisdiction in all misdemeanor criminal cases to receive a plea of guilty or nolo contendere, appoint a time for pronouncing judgment, and pronounce judgment.

(d) The superior court in a county in which there is no municipal court has the jurisdiction provided in subdivisions (a) and (b).

Judge Patrick believes this revision creates an unnecessary redundancy. He suggests a simpler alternative — strike out "misdemeanor" in subdivision (c) and eliminate subdivision (d). "This would then appropriately cover the superior court jurisdiction whether there was or was not a unified court."

The staff admits that our original draft is not particularly elegant. However, we do not see that Judge Patrick's proposal is adequate. **We would not make the suggested change.**

Penal Code § 1466 (amended). Appeals

Penal Code Section 1466 currently is located among the statutes dealing with appeals from the municipal court. Subdivision (b) provides that appeals from the municipal court in a felony case are to the court of appeal, rather than to the appellate department of the superior court.

Since we are recasting the Penal Code statutes to deal with appeals by type of case (felony or misdemeanor) rather than by type of court (superior or municipal), Section 1466(b) should be relocated among the statutes dealing with felonies. Thus it would be deleted from Section 1466 and inserted in Section 1235:

1466. ~~(a)~~ An appeal may be taken from a judgment or order ~~of an inferior court~~ in an infraction or misdemeanor case to the appellate division of the superior court of the county in which the ~~inferior~~ court from which the appeal is taken is located, in the following cases:

(1) By the people:

(A) From an order recusing the district attorney or city attorney pursuant to Section 1424.

(B) From an order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(C) From a judgment for the defendant upon the sustaining of a demurrer.

(D) From an order granting a new trial.

(E) From an order arresting judgment.

(F) From any order made after judgment affecting the substantial rights of the people.

(2) By the defendant:

(A) From a final judgment of conviction. A sentence, an order granting probation, a conviction in a case in which before final judgment the defendant is committed for insanity or is given an indeterminate commitment as a mentally disordered sex offender, or the conviction of a defendant committed for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. Upon appeal from a final judgment or an order granting probation the court may review any order denying a motion for a new trial.

(B) From any order made after judgment affecting his or her substantial rights.

~~(b) An appeal from the judgment or appealable order of an inferior court in a felony case is to the court of appeal for the district in which the court is located.~~

Comment. Section 1466 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). *Cf.* Section 691 & Comment. Appeals in misdemeanor and infraction cases lie to the appellate division of the superior court. Appeals in felony cases lie to the court of appeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. See Section 1235 & Comment. *Cf.* Cal. Const. art. VI, § 11(a) (court of appeal appellate jurisdiction when superior courts have original jurisdiction and in other causes provided by statute).

Criminal cases of which the juvenile court is given jurisdiction are governed by the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code. See Welf. & Inst. Code §§ 203 (juvenile court proceedings non-criminal), 245 (superior court jurisdiction), 602 (criminal law violation by minor subject to juvenile court jurisdiction), 603 (juvenile crimes not governed by general criminal law).

1235. (a) Either party to a ~~criminal action within the original trial jurisdiction of a superior court~~ felony case may appeal ~~from that court~~ on questions of law alone, as prescribed in this title and in rules adopted by the Judicial Council. The provisions of this title apply only to such appeals.

(b) An appeal from the judgment or appealable order in a felony case is to the court of appeal for the district in which the court from which the appeal is taken is located.

Comment. Section 1235 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e). See also Section 691(f) ("felony case" defined).

Subdivision (b) continues former Section 1466(b). Appeals in felony cases lie to the court of appeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) (court of appeal appellate jurisdiction when superior courts have original jurisdiction and in other causes provided by statute).

Penal Code § 1471 (amended). Transfer to court of appeal

Section 1471 includes a paragraph, not touched in our tentative recommendation, that:

> No case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in such case becomes final therein.

The Department of Justice indicates that this provision is surplus, after abolition of the justice courts.

The Department of Justice appears to be correct. **The staff would delete this provision**, subject to any caveats that may be revealed by further research on the matter.

Penal Code § 1538.5 (amended). Motion to return property or suppress evidence

Judge Patrick points out that this section was amended in the 1997 legislative session and thus needs to be updated. **The staff will do that for this section, and for all sections affected by 1997 legislation in all the tentative recommendations.**

Section 1538.5 provides for a motion to suppress evidence on a number of grounds, including "violation of state constitutional standards". Section 1538.5(a)(2). However, Proposition 8, the Victims' Bill of Rights, includes a provision that "relevant evidence shall not be excluded in any criminal

proceeding" except as provided by statute thereafter enacted by a two-thirds vote of the Legislature. Cal. Const. Art. I, § 28(d). Proposition 8 was approved by the voters in 1982. Section 1538.5 was thereafter amended in other respects by a two-thirds vote of the Legislature. That raised the issue whether the action of the Legislature in "reenacting" Section 1538.5(a)(2) in effect reinstated the exclusionary rule. The Court of Appeal said no in *People v. Daan*, 161 Cal. App. 3d 22 (1984).

The Department of Justice suggests a Commission Comment to the effect that the reenactment of Section 1538.5 in the trial court unification bill is not intended to reinstate the exclusionary rule "could avoid a similar confusion". Exhibit p. 1. **The staff wonders whether this is a real issue**, given the existence of the *Daan* case and the fact that Section 1538.5 has been amended five times since enactment of Proposition 8 (although we do not know if it was by a two-thirds vote each time; it was amended by a two-thirds vote in 1997). If disclaiming language is felt necessary, the following may suffice: "This amendment of Section 1538.5 is not intended to modify Article I, Section 28(d) of the California Constitution. Cf. People v. Daan, 161 Cal. App. 3d 22 (1984)."

Penal Code § 4004 (amended). Confinement and custody

Judge Patrick points out that one sentence of this statute does not acknowledge the situation that exists in counties such as San Diego, where the marshal serves both the superior and municipal courts. **He suggests the following revision, which the staff believes is acceptable**: "In ~~judicial districts~~ courts where there is a marshal, the marshal shall maintain custody of such prisoner while ~~he~~ the prisoner is in the ~~municipal~~ court facility pursuant to such court order."

Penal Code § 13125 (amended). Criminal offender record information systems

Existing law requires storage of criminal offender record information, including certain "lower court" data. The tentative recommendation would substitute a reference to "municipal court or preliminary hearing" data. The Department of Justice notes that a better reference, under unification, would be to "misdemeanor or infraction or preliminary hearing" data. **The staff agrees this is an improvement and would make the change.**

One item of information required in this category of lower court data is "original offenses charged in complaint to superior court". Judge Patrick points

out that the reference to the superior court is confusing here, and a simple reference to offenses charged in the complaint should be sufficient. The staff has forwarded this suggestion to the Department of Justice, which agrees, and would substitute "original offenses charged in complaint or citation". **The staff will make this change.**

Miscellaneous Technical Revisions

The staff will also implement any technical revisions it discovers in the process of preparing the legislation for introduction. See, e.g., page 65, line 4.

Respectfully submitted,

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October 29, 1997

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RE: Trial Court Unification, Penal Code Revisions

Dear Mr. Sterling:

In response to the Commission's invitation, we have reviewed the tentative recommendation for revision of the Penal Code. We understand that the purpose of the revision is to accommodate trial court unification should the voters approve SCA 4 next June. We note the Commission's intent to "narrowly limit its recommendations to generally preserve existing procedures for the cases they now govern."

We have comments on the following Penal Code sections:

Section 1538.5

When section 1538.5 was reenacted for procedural reasons in 1982, there was confusion as to whether the reenactment reinstated state constitutional grounds as a basis for the exclusion of evidence. (Cal. Const., art. 1, § 28d; *People* v. *Daan* (1984) 161 Cal.App.3d 22.) The Commission could avoid a similar confusion by an appropriate comment to section 1538.5.

Section 13125

This section governs the storage of state and local criminal offender record information. Currently, the section has a category entitled "the following lower court data." The Commission would substitute this language: "the following municipal court or preliminary hearing data." On its face, this substitution would not account for misdemeanor data in a unified court. Such misdemeanor data would be included if the person reading the section knows to refer to the constitutional provision of SCA 4 (art. 6, § 23c), which provides that upon unification, the business of the municipal court becomes the business of the superior court. We would suggest, however, that

the language in section 13125 be amended as follows: "the following misdemeanor or infraction or preliminary hearing data."

Section 1007

This section currently contains the phrase "if the demurrer is sustained by a superior court." The revision would substitute the phrase "in a felony case" for the phrase "by a superior court." This substitution, however, would unintentionally include a felony complaint before a magistrate of a unified superior court. We suggest this language: "if a demurrer to an indictment or an information is sustained."

Section 1471

This section currently includes this language: "no case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in such case becomes final therein." We believe that with the abolition of the justice courts, this language became surplusage. (See Stats. 1977, ch. 1257, p. 4788, § 127.)

Section 949

The current language of this section includes this: "the first pleading on the part of the People in the superior court is the indictment, information, accusation or the complaint in any case certified to the superior court under section 859a . . . . " The revision would delete the references to the superior court, and in place of the first superior court reference would substitute "a felony case." Our understanding of the law, however, is that conduct underlying an accusation need not be felonious. (See *Steiner* v. *Superior Court* (1996) 50 Cal.App.4th 1771, 1780-1782; and see comment on revision to Government Code § 3070 below.) We would suggest that the word "accusation" be deleted from the quoted language and that this separate sentence be added: "the first pleading on the part of the People in a proceeding pursuant to Government Code section 3060 is an accusation."

In its comment to the proposed revision for Penal Code section 691, the Commission refers to a proposed revision to Government Code section 3070, a section addressed to the removal of an official for misconduct.

Section 3070 currently provides that the trial of a removal case be conducted in the same manner as a trial on an indictment. The Commission's revision would amend the section to provide

that the entire removal proceedings, pretrial, trial, and posttrial be conducted in the same manner as proceedings on an indictment:

> "The trial shall be by a jury, and proceedings shall be conducted in all respects in the same manner as ~~the trial of~~ proceedings in a felony case prosecuted by an indictment."

The Commission's comment to this proposed revision states that the section is "amended to make clear that proceedings under this article are treated as a felony for purposes of the Penal Code, including appeal rights applicable in felony cases."

We believe this comment contains an incorrect assumption. Currently, proceedings on an accusation do incorporate aspects of felony proceedings, (see e.g. *Steiner* v. *Superior Court*, *supra*, 50 Cal.App.4th at 1780-1781), but the cases have not required that all aspects of a removal proceeding be conducted in the same manner as a felony indictment proceeding. (See *People* v. *Superior Court (Hansen)* (1980) 110 Cal.App.3d 396; *Bradley* v. *Lacy* (1997) 53 Cal.App.4th 883.) Also, the Government Code specifies certain pretrial procedures for accusation proceedings which, though similar to those on an indictment, are not the same. (See e.g. Government Code sections 3063-3064; see also Government Code sections 3061-3062, 3065-3069.)

In connection with the proposed revision of Government Code section 3070, the Commission refers to proposed revisions of Penal Code sections 737 and 860. Section 737 currently reads as follows: "All public offenses triable in the superior court shall be prosecuted therein by indictment or information, except as provided in the Government Code, the juvenile court law under Chapter 2 (commencing with § 200) of Division of the Welfare and Institutions Code and section 859a." (Underscoring added.) One of the changes the revision would make is the deletion of the underscored reference to the Government Code. We believe that deletion is unnecessary.

Section 860 addresses the conduct of the preliminary examination and provides that the magistrate must allow the defendant a reasonable time to send for counsel. Currently, the section applies to felonies except where the defendant has pled guilty pursuant to section 859a. The section also purports to apply to a "public offense" which is "not a felony but within the jurisdiction of the superior court." The meaning of this language is unclear and the Commission has apparently interpreted it as including a public offense that is the basis for an accusation. Deletion of the language is necessary because in a unified court the jurisdiction of the superior court would include misdemeanors and infractions for which no preliminary examination has ever been intended. We believe, however, that the language also was never intended to apply to a public offense that is the basis of an accusation. This is because a person accused by way of accusation has no right to a preliminary examination and no occasion to appear before a magistrate. (See *People* v. *Superior Court (Hansen)*, *supra*, 110 Cal.App.3d at 399; Government Code, §§ 3061-3070.) Thus, we do not believe that the proposed revision to section 860 requires any revision of the statutes governing removal proceedings.

As our final comment, we would urge the Commission to include its statement of intent to preserve existing procedures in one or more of the comments that are to follow some of the revised sections. This would help to prevent the revision from having unintended consequences.

We hope that our comments are useful to the Commission.

Sincerely,

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GW:ss

California Attorneys for Criminal Justice

CACJ

California Law Revision Commission
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Palo Alto, California, 94303-4739
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November 21, 1997 Re: Trial Court Unification: Revision of Penal Code

To whom it may concern:

I write on behalf of California Attorneys for Criminal Justice (CACJ), a statewide organization of criminal defense attorneys, to comment on the proposed changes to the Penal Code in order to implement trial court unification.

Our review of the proposed changes found them to be technical in nature, and we have no comment directly as to these changes. However, CACJ believes that the proposed revision creates an opportunity to address a crucial technical issue not currently addressed in your proposal.

Our concern with regard to criminal cases in the newly unified courts is the possibility that a judge who presides at a preliminary hearing could then be in a position to rule on a motion challenging the rulings made at that hearing -- a procedure that would obviously be inappropriate. We therefore would suggest the addition of the following language to Code of Civil Procedure Section 170.6 and following Penal Code Section 859b : "All motions challenging rulings made by a judge at or before the preliminary hearing shall not be ruled on by the same judge who made the challenged rulings, unless agreed to by the parties."

Thank you for giving us the opportunity to comment on the proposed changes. If you have any questions regarding our position, please do not hesitate to call me at my office.

Very truly yours,

Katherine Sher

Katherine Sher
Legislative Advocate

THE MUNICIPAL COURT
SAN DIEGO JUDICIAL DISTRICT
220 WEST BROADWAY
SAN DIEGO, CALIFORNIA 92101-3877

HONORABLE CHARLES L. PATRICK
JUDGE

November 21, 1997

California Law Revision Commission
4000 Middlefield Road, Room D1
Palo Alto, CA 94303-4739

Re: Trial Court Unification: Revision of Penal Code
(Tentative Recommendation)

Gentlemen:

Thank you for the opportunity to review the above proposal. I have the following comments and/or suggestions:

P.C. 691 (pg. 20) - Paragraph (f) should be clarified by changing the concluding words to read ".... misdemeanor or infraction charged in conjunction with one or more felonies." Paragraph (g) should likewise be changed to read ".... misdemeanor or infraction is charged, but no felony is also charged." I believe the original language is ambiguous and potentially confusing.

P.C. 859, 860 (pgs. 28-29) - I recognize that your responsibility was primarily (or entirely) limited to making changes required by possible consolidation. However, I would nevertheless believe it would be appropriate to make at the same time what would hopefully be non-controversial changes to eliminate archaic language which has no application to today's real world. To that end, I would suggest deletion of the two sentences in P.C. 859 (lines 18-21) which require a peace officer to take (or "transmit") a message to counsel, and the combination (and revision) of the first two sentences in P.C. 860 to read "At the time set for the examination in accordance with Section 859b, the magistrate shall proceed to examine the case; provided, however, that ....". The subject of counsel having been thoroughly covered in sections 859, 859a and 859b, it is unnecessary, confusing and redundant to again cover it in section 860.

P.C. 869 (pgs. 29-30) - again there is archaic language which is totally unnecessary. I would suggest: "869.(a) The magistrate shall require that the

proceedings be taken down in their entirety by a duly appointed reporter, or otherwise as provided by law." Paragraphs (a), (b), (c), and (d) would be deleted, and paragraphs (e), (f) and (g) should be re-numbered as (b), (c) and (d).

P.C. 949 (pg. 30) - when you deleted "superior court" in your draft, you changed the meaning. "Felony case" in this context would obviously have to include those which might be filed in any remaining municipal courts. I suggest rewording (to achieve accuracy and to make the phraseology less awkward) to say ".... a felony case is an indictment, information, accusation, or a complaint filed pursuant to Section 859." I believe section 859 should be the reference - not 859a.

P.C. 977 (c) (pg. 32) - in the middle of the paragraph (lines 12 and 13) , there's a sentence which in your draft states "However, if the defendant is represented by counsel at an initial hearing in Superior Court in a felony case, *and if the defendant does not plead guilty or nolo contendre to any charge,* (emphasis added) the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing." This, of course, is pre-existing language, and not related to the changes you are making. However, the emphasized portion makes no sense to me, unless it was intended to require that where a plea was to be taken, the attorney must be present at the same location with the defendant. If that's what is meant, the sentence should be restructured to make that clear - otherwise, the emphasized phrase should be deleted.

P.C. 977.2 (a)(2) (pg. 33) - the same comments as to PC 977 apply here as well (lines 6 and 7).

P.C. 987.1 (pg. 35) - since in a consolidated court, any bindover would be from a superior court to a superior court, the reference to "superior court" in this section (line 41) should be deleted so that it would read ".... arraignment on the information unless ...."

P.C. 987.2(i) (pg. 38) - although the "comment" at lines 14 and 15 purports to limit the scope of the right to court-appointed counsel in infraction cases, I believe that is insufficient. We must remove any ambiguity on that issue by making the section read "In misdemeanor cases, and in infraction cases as provided in Section 19.6, counsel shall be appointed to represent a person who desires ...."

P.C. 1007 (pg. 40) - since demurrers can be entered to a felony complaint (as well as to an indictment or information), the reference in line 20 to "a superior court" (which you have deleted and replaced by "in a felony case") should instead read ".... demurrer is sustained to an indictment or information, the court must ...." This would make it clear that demurrers to a complaint (whether felony, misdemeanor or infraction) would be handled in accordance with the sentence beginning at line 25.

P.C. 1010 (pg. 41) - this presents the same problem as discussed in reference to Section 1007. Instead of saying "felony case", the reference should be "1010. When an indictment or information is dismissed ...."

P.C. 1050 (h) (pg. 44) - again, using the term "felony case" to replace "superior court" creates a different effect where there is a unified court, since that would now include felony cases which are still at the complaint phase. In paragraph (h), this problem should be avoided by having it read ".... defendant's first appearance on an indictment or information is a member ...."

P.C. 1203.1 (a) (pg. 46) - my comment on this section is, I recognize, outside the scope of your assignment. However, the language of the second paragraph of this subsection (permitting probation for up to 5 years) appears on its face to include misdemeanor cases (although it has not been so interpreted, and is in conflict with P.C. 1203b). I suggest eliminating the conflict by making that second paragraph read ".... However, where the maximum possible term of the sentence in a felony case is five years ....".

P.C. 1309 (pgs. 54-55) - this section appears to have been impliedly repealed by the enactment of P.C. 1463.066 in 1996. As you have indicated, deletion appears appropriate.

P.C. 1462 (pg. 63) - your proposed amendment creates an unnecessary redundancy. I would eliminate your new paragraph (d), and reword paragraph (c) by simply striking the word "misdemeanor." This would then appropriately cover the superior court jurisdiction whether there was or was not a unified court.

P.C. 1538.5 (pgs. 67-71) - this section must of course be updated to reflect amendments enacted by the 1997 legislature (there may very well be other sections which were also modified by new legislation while your work was in progress).

P.C. 4004 (pg. 73) - the wording of this section does not acknowledge the situation which exists in counties (such as San Diego) where the marshal serves both the superior and municipal courts. I suggest remedying this by deleting the words "judicial districts" in line 31 of your draft and replacing that with "courts", and deleting "municipal" just before the words "court facility" in line 33.

P.C. 13125 (pg. 75) - in line 28, the reference is to "Original offenses charged in complaint to superior court." This appears to be a confusing reference, whether or not the courts are unified. I suggest rewording it to read just "Offenses charged in complaint". All else is superfluous and/or ambiguous.

P.C. 1278 (pg. 85) - in order to cover both unified and non-unified courts, why not have a blank for the name of the court to be inserted (instead of replacing "Justice" with "Superior")?

P.C. 1281a (pg. 86) - again, in order to cover all courts in all counties, why not delete "municipal" also? That way, whether there were or were not municipal courts in the particular county, the provision would still be applicable.

P.C. 1327 (pg. 86) - my comment here would be the same as to P.C. 1278 - just leave a blank for the name of the court (both in lines 13 and 18).

I appreciate the monumental nature of your task, and the extraordinary effort you have made to ferret out all the provisions which would be affected by consolidation. I would be happy to respond to any questions or comments you may have to my suggestions. I can be reached at (619) 531-3214.

Sincerely,

CHARLES L. PATRICK
Judge of the Municipal Court

CLP/plb