

Memorandum 99-12

Trial Court Unification: Penal Code Cleanup

Among the items identified for future study in the Commission's trial court unification report were Penal Code Sections 859, 859a, 859b, and 860, relating to defense counsel in a criminal case. The report said these sections "appear to be somewhat dated, and their interrelation is unclear. A clearer statutory statement of the governing rules may be appropriate."

This was brought to the Commission's attention by Judge Charles Patrick of the San Diego Municipal Court. Judge Patrick wrote, "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." Memo 97-83; see also Memo 98-3. Twelve relevant sections — Sections 686, 686.1, 858, 858.5, 858.7, 859, 859a, 859b, 860, 861, 987, and 1018 — are set out in the attached exhibit.

This memorandum discusses the following issues: (1) right of arrestee to contact counsel, (2) defendant's constitutional right of self-representation, (3) time limits for preliminary examination in felony case, and (4) broader Penal Code cleanup. This memorandum draws on research by the Commission's research assistant, Linda Verheecke. **This memorandum concludes that the Commission should not propose legislation in any of these areas.**

RIGHT OF ARRESTEE TO CONTACT COUNSEL

We solved Judge Patrick's problem with Section 859 by deleting language that read, "The magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty." This deleted language conflicted with language in Article I, Section 14, of the California Constitution that reads, "On the defendant's request the magistrate shall require a peace officer to transmit within the county where the court is located a message to counsel named by defendant." The question is whether any more cleanup is needed.

Penal Code Section 851.5 gives an arrestee a right to make “at least three completed telephone calls” no later than three hours after the arrest. The phone call is free if within the local calling area, and at defendant’s expense if outside the local calling area. If the call is to an attorney, it “shall not be monitored, eavesdropped upon, or recorded.” Penal Code Section 825 says that, after an arrest, “any attorney at law licensed to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested.” See generally 4 B. Witkin & N. Epstein, *California Criminal Law Proceedings Before Trial* §§ 1945-1946, at 2300-02 (2d ed. 1989). **Sections 825 and 851.5 cover the arrestee’s right to communicate and confer with counsel satisfactorily, and no more cleanup is needed.**

CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION

Faretta v. California, 422 U.S. 806 (1975), held that a defendant in a criminal case has a constitutional right of self-representation. Although *Faretta* was a noncapital felony case, the right of self-representation applies also in a capital case. *People v. Kirkpatrick*, 7 Cal. 4th 988, 874 P.2d 248, 30 Cal. Rptr. 818 (1994); *People v. Superior Court (George)*, 24 Cal. App. 4th 350, 29 Cal. Rptr. 2d 305 (1994). The only determination the court must make when a timely *Faretta* motion is made is whether defendant has the mental capacity to waive counsel, understanding the risks and consequences of so doing. 24 Cal. App. 4th at 354.

Because of *Faretta*, Penal Code sections requiring defendant to have counsel in felony cases are of doubtful constitutionality. *Thomas v. Superior Court*, 54 Cal. App. 3d 1054, 1057, 126 Cal. Rptr 830 (1976) (referring to Sections 686, 686.1, 859, and 987); *People v. Ingels*, 216 Cal. App. 3d 1303, 1307, 265 Cal. Rptr. 521 (1989) (Section 859a inconsistent with *Faretta*); 5 B. Witkin & N. Epstein, *California Criminal Law Trial* § 2811, at 3416 (2d ed. 1989). These sections are:

Section 686: In a capital case, defendant “shall be represented in court by counsel at all stages of the preliminary and trial proceedings.”

Section 686.1: “Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings.”

Section 859: In “a capital case, the court shall inform the defendant that the defendant must be represented by counsel at all stages

of the preliminary and trial proceedings”; if defendant refuses to employ counsel, “the court shall assign counsel to defend him or her.”

Section 859a: In a noncapital felony case, “when the defendant’s counsel is present, the defendant may plead guilty to the offense charged”; this “shall not be construed to authorize the receiving of a plea of guilty or nolo contendere from any defendant not represented by counsel.”

Section 987: “In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him or her that he or she shall be represented by counsel at all stages of the preliminary and trial proceedings”; if defendant refuses to employ counsel, “the court shall assign counsel”

The only exception to defendant’s constitutional right of self-representation is at the plea stage of a capital case: *Faretta* does not abrogate the rule of Penal Code Section 1018 that a guilty plea in a capital case requires consent of counsel — the “danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant’s right to plead guilty in capital cases is subject to the requirement of his counsel’s consent.” *People v. Chadd*, 28 Cal. 3d 739, 750-52, 621 P.2d 837, 170 Cal. Rptr. 798 (1981); 4 B. Witkin & N. Epstein, *California Criminal Law Proceedings Without Trial* § 2143, at 2513 (2d ed. 1989); 5 B. Witkin & N. Epstein, *California Criminal Law Trial* § 2811, at 3416 (2d ed. 1989). Whether a guilty plea may be received from a defendant without counsel in a noncapital case for which the maximum punishment is life imprisonment without possibility of parole is an open question — there is no controlling authority in California.

One approach to removing the constitutional conflict in these five sections would be to add language to each that “Nothing in this section is intended to deprive a defendant of the constitutional right of self-representation.” The staff discussed this with Tony Kelly of the California District Attorneys’ Association. Mr. Kelly said the Association prefers the Commission not get involved in this area. The Association is concerned about what might emerge at the end of the legislative process in view of a political climate which the Association views as not cordial to its interests. Also, Sections 859, 859a, and 987 were amended by the Legislature at the last session (1998) without addressing the self-representation issue.

Mr. Kelly said the District Attorneys' Association would have less of a problem with merely adding a single new section to the Penal Code, as follows:

860.5. Nothing in this code is intended to deprive a defendant of the constitutional right of self-representation, or to limit that right.

Comment. Section 860.5 is added to recognize that a defendant may have a constitutional right of self-representation. See *Faretta v. California*, 422 U.S. 806 (1975). To the extent Sections 686, 686.1, 859, 859a, and 987 prohibited waiver of the right to counsel, they were of doubtful constitutionality. See *Thomas v. Superior Court*, 54 Cal. App. 3d 1054, 1057-58, 126 Cal. Rptr 830 (1976); *People v. Ingels*, 216 Cal. App. 3d 1303, 1307, 265 Cal. Rptr. 521 (1989); 5 B. Witkin, *California Criminal Law Trial* § 2811, at 3416 (2d ed. 1989).

The staff thinks the benefit of adding this section is too marginal, and that it is too far removed from trial court unification to justify it.

TIME LIMITS FOR PRELIMINARY EXAMINATION IN FELONY CASE

Two-Day Minimum Preparation Time Directory Only

Penal Code Section 859b says that, when a defendant charged with a felony appears for arraignment and has not pleaded guilty, in setting the preliminary examination, the magistrate shall allow “not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination.” This requirement has been held to be directory, not mandatory. Failure to comply does not deprive the court of jurisdiction. *People v. Castaneda*, 190 Cal. App. 3d 961, 966-67, 235 Cal. Rptr. 740 (1987). We could codify *Castaneda* by amending the first paragraph of Section 859b as follows:

859b. At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, shall set a time for the examination of the case and shall allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. This time requirement is directory only. The magistrate shall also issue subpoenas, duly subscribed, for witnesses within the state, required either by the prosecution or the defense.

Comment. The first paragraph of Section 859b is amended to make clear the requirement of at least two days until the date set for the preliminary examination is directory only. This codifies *People v. Castaneda*, 190 Cal. App. 3d 961, 966-67, 235 Cal. Rptr. 740 (1987).

Ten-Day Maximum Time

Section 859b prevents prolonged incarceration by requiring the preliminary examination to be held within 10 court days of the arraignment or plea, whichever is later. If the district attorney cannot proceed within this time and shows good cause, the preliminary examination may be set beyond the 10 day limit, but Section 859b requires a defendant in custody to be released on his or her own recognizance. Section 859b has some express exceptions to this rule. Other exceptions are found in case law, including the following:

(1) If a defendant asserts both a right to a preliminary hearing within 10 court days and a right to effective counsel, the preliminary hearing may be delayed to effectuate the right to counsel. *In re Samano*, 31 Cal. App. 4th 989, 37 Cal. Rptr. 2d 491, 494 (1995); *People v. Kowalski*, 196 Cal. App. 3d 174, 179, 242 Cal. Rptr. 32 (1987). Section 860 allows the defendant a reasonable time to obtain counsel, and permits the magistrate to postpone the preliminary examination “for not less than two nor more than five days for that purpose.” However, *Samano* and *Kowalski* held that delay to effectuate the right to counsel prevails over the time limits in Section 859b because the right to counsel is of constitutional dimension, while the time limits are merely statutory.

(2) If a defendant asserts a right to self-representation and time is needed to evaluate his or her mental competency, the 10-day rule need not be enforced. *In re Samano, supra*.

We could recognize these two case law exceptions by revising the third paragraph of Section 859b as follows:

Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either any of the following occur:

(a) The defendant personally waives his or her right to preliminary examination within the 10 court days.

(b) The prosecution establishes good cause for a continuance beyond the 10-court-day period.

(c) The court determines that, to the extent required by the United States Constitution or the Constitution of the State of California, longer than 10 court days is needed either to effectuate the defendant's right to assistance of counsel or to determine the defendant's competence to exercise a claimed right of self-representation.

Comment. . . .

The third paragraph of Section 859b is amended to add subdivision (c). The provision in subdivision (c) authorizing the court to determine that longer than 10 court days is needed to effectuate the defendant's right to assistance of counsel codifies *In re Samano*, 31 Cal. App. 4th 989, 990, 37 Cal. Rptr. 2d 491 (1995), and *People v. Kowalski*, 196 Cal. App. 3d 174, 179, 242 Cal. Rptr. 32 (1987). See also Section 860 (allowing defendant a reasonable time to obtain counsel, and permitting postponement of preliminary examination for not less than two nor more than five days for that purpose). The provision in subdivision (c) authorizing the court to determine that longer than 10 court days is needed to determine the defendant's competence to exercise a claimed right of self-representation codifies *In re Samano*, *supra*, and *Curry v. Superior Court*, 75 Cal. App. 3d 221, 225-26, 141 Cal. Rptr. 884 (1977). See also Section 861(a)(2) (if preliminary examination postponed beyond 10-court-day period and defendant in custody, defendant shall be released pursuant to subdivision (b) of Section 859b).

Two other case law exceptions to the ten-day rule of Section 859a do not require amendment of the section:

(1) Good cause to set the preliminary examination beyond the 10-day limit is established where necessary to preserve joinder of multiple defendants. *In re Samano*, *supra*. This case is not in conflict with Section 859b, because Section 859b already recognizes a good cause exception. The case is merely a specific application of general statutory language. **Section 859b is satisfactory in this respect.**

(2) A defendant must be released from custody only if in custody solely because of charges which are the subject of the preliminary hearing. *In re Samano*, *supra*. The first case to impose this requirement was in 1980. *Blake v. Superior Court*, 108 Cal. App. 3d 244, 248, 166 Cal. Rptr. 470 (1980) (construing the dismissal provisions of Section 859b). In 1981, Section 859b was amended to codify this by requiring dismissal of the complaint only if defendant has been in

custody for 10 or more court days “solely on that complaint.” **Section 859b is satisfactory in this respect.**

BROADER PENAL CODE CLEANUP?

The sections identified by Judge Patrick are in Chapter 7 (commencing with Section 858) of Title 3 of Part 2 of the Penal Code. Chapter 7 is entitled “Examination of the Case, and Discharge of the Defendant, or Holding Him to Answer,” and contains 40 interrelated sections. Like much of the Penal Code, Chapter 7 is poorly drafted. The 40 sections were added at different times, and amendments have not always been coordinated with existing provisions. The drafting of Chapter 7 could obviously be improved, but it appears to be no worse than other chapters in the Penal Code. To redraft Chapter 7 would require a significant investment of staff resources.

The staff believes the California District Attorneys’ Association would have serious concerns about the Commission undertaking a more general Penal Code cleanup. **In view of the size of the project and concerns of the District Attorneys’ Association, the staff recommends the Commission not undertake to redraft Chapter 7.**

CONCLUSION

The staff recommends the Commission not propose legislation in this area. We would include in the Commission’s report to the Legislature on trial court unification implementation a statement that, while the statutes are not well drafted, we believe cleanup to be too far removed from the subject of trial court unification.

Respectfully submitted,

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Staff Counsel

Exhibit

TRIAL COURT UNIFICATION: PENAL CODE CLEANUP

Penal Code § 686. Rights of defendant

686. In criminal action the defendant is entitled:

1. To a speedy and public trial.
2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel, except that in a capital case he shall be represented in court by counsel at all stages of the preliminary and trial proceedings.
3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that:
 - (a) Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this state.
 - (b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this state.

☞ *Note.* The portion of paragraph 2 requiring counsel in a capital case is inconsistent with the constitutional right of self-representation.

Penal Code § 686.1. Requirement of counsel for defendant in capital case

686.1. Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings.

☞ *Note.* Section 686.1 is inconsistent with the constitutional right of self-representation.

Penal Code § 858. Magistrate to inform defendant of charge and right to counsel

858. When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, and unless the defendant is a member of the armed forces of the United States and the offense charged is a misdemeanor, he shall immediately either notify the parent or guardian of the minor, by telephone, telegram, or messenger, of the arrest, or appoint counsel to represent the minor.

☞ *Note.* The second sentence in Section 858 (if defendant may be a minor, magistrate shall notify parent or guardian) duplicates the last sentence of Section 859.

Penal Code § 858.5. Arrest for misdemeanor Vehicle Code violations

858.5. (a) In any case in which a defendant is, on his demand, brought before a magistrate pursuant to Section 822 after arrest for a misdemeanor Vehicle Code violation, the magistrate shall give such instructions to the defendant as required by law and inform the defendant of his rights under this section, and, if the defendant desires to plead guilty or nolo contendere to the charge in the complaint, he may so advise the magistrate. If the magistrate determines that such plea would be in the interest of justice, he shall direct the defendant to appear before a specified appropriate court in the county in which defendant has been arrested at a designated certain time, which in no case shall be more than 10 calendar days from the date of arrest, for plea and sentencing. The magistrate shall request the court in which the complaint has been filed to transmit a certified copy of the complaint and any citation and any factual report which may have been prepared by the law enforcement agency that investigated the case to the court in which defendant is to appear for plea and sentencing. If the court of which the request is made deems such action to be in the interest of justice, and the district attorney of the county in which that court sits, after notice from the court of the request it has received, does not object to such action, the court shall immediately transmit a certified copy of the complaint and the report of the law enforcement agency that investigated the case, and, if not, shall advise the requesting magistrate of its decision not to take such action.

When defendant appears for plea and sentencing, and if a copy of the complaint has been transmitted, the court shall read the copy of the complaint to him, and the defendant may plead guilty or nolo contendere. Such court shall have jurisdiction to accept the plea and impose a sentence. Such court shall notify the court in which the complaint was originally filed of the disposition of the case. If defendant does not plead guilty or nolo contendere, or if transmittal of a copy of the complaint has been refused or if a copy of the complaint has not been received, the court shall terminate the proceedings under this section and shall direct the defendant to appear before the court or magistrate by whom the warrant was issued on or before a certain day which in no case shall be more than five days after the date such direction is made.

(b) Any fines imposed by a court which is given authority to sentence pursuant to this section shall be remitted to the court in which the complaint was originally filed for disposition as required by law. The county of the sentencing court shall bear all costs incurred incident to acceptance of the plea and sentencing, and no part of such costs shall be deducted from the fine remitted to the court in which the complaint was filed.

Penal Code § 858.7. Prisoner's plea to misdemeanor Vehicle Code charge in another county

858.7. (a) In any case in which the defendant has been convicted of a misdemeanor and is serving a sentence as a result of such conviction and there has been filed and is pending in another county a complaint charging him with a misdemeanor Vehicle Code violation, the defendant may appear before the court that sentenced him, and a magistrate of that court shall give such instructions to the defendant as required by law and inform the defendant of his rights under this section, and, if the defendant desires to plead guilty or nolo contendere to the charge in the complaint, he may so advise the magistrate. If the magistrate determines that such plea would be in the interest of justice, he shall direct the defendant to appear before a specified appropriate court in the county in which defendant is serving his sentence at a designated certain time for plea and sentencing. The

magistrate shall request the court in which the complaint has been filed to transmit a certified copy of the complaint and any citation and any factual report which may have been prepared by the law enforcement agency that investigated the case to the court in which defendant is to appear for plea and sentencing. If the court of which the request is made deems such action to be in the interest of justice, and the district attorney of the county in which that court sits, after notice from the court of the request it has received, does not object to such action, the court shall immediately transmit a certified copy of the complaint and any report of the law enforcement agency that investigated the case, and, if not, shall advise the requesting magistrate of its decision not to take such action.

When defendant appears for plea and sentencing, and if a copy of the complaint has been transmitted, the court shall read the copy of the complaint to him, and the defendant may plead guilty or nolo contendere. Such court shall have jurisdiction to accept the plea and impose a sentence. Such court shall notify the court in which the complaint was originally filed of the disposition of the case. If defendant does not plead guilty or nolo contendere, or if transmittal of a copy of the complaint has been refused or if a copy of the complaint has not been received, the court shall terminate the proceedings under this section and shall direct the defendant to appear before the court in which the complaint was filed and is pending on or before a certain day.

(b)(1) Any fines imposed by a court which is given authority to sentence pursuant to this section shall be remitted to the court in which the complaint was originally filed for disposition as required by law. Except as otherwise provided in paragraph (2) of this subdivision, the county of the sentencing court shall bear all costs incurred incident to acceptance of the plea and sentencing, and no part of such costs shall be deducted from the fine remitted to the court in which the complaint was filed.


(2) In any case in which a defendant is sentenced to imprisonment pursuant to this section, and as a result of such sentence he is required to be imprisoned for a time in addition to, and not concurrent with, the time he is imprisoned as a result of the sentence he is otherwise serving, the county in which the complaint was originally filed shall bear the cost of such additional time of imprisonment that the defendant is required to serve. Such cost may be deducted from any fine required to be remitted pursuant to paragraph (1) of this subdivision to the court in which the complaint was originally filed.

(c) As used in this section, "complaint" includes, but is not limited to, a notice to appear which is within the provisions of Section 40513 of the Vehicle Code.

Penal Code § 859. Counsel for defendant

859. When the defendant is charged with the commission of a felony by a written complaint subscribed under oath and on file in a court within the county in which the felony is triable, he or she shall, without unnecessary delay, be taken before a magistrate of the court in which the complaint is on file. The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel, ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that the defendant must be represented in court by counsel at all stages of the preliminary and trial proceedings and that the representation will be at the defendant's expense if the defendant is able to employ counsel or at public expense if he or she is unable to employ counsel, inquire of him or


her whether he or she is able to employ counsel and, if so, whether the defendant desires to employ counsel of the defendant's choice or to have counsel assigned for him or her, and allow the defendant a reasonable time to send for his or her chosen or assigned counsel. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him or her. If it appears that the defendant may be a minor, the magistrate shall ascertain whether that is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he or she shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor.

 **Note.** *The portions of third and fourth sentences of Section 859 requiring counsel in a capital case are inconsistent with the constitutional right of self-representation.*

Penal Code § 859a. Pleading

859a. (a) If the public offense charged is a felony not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him or her whether he or she pleads guilty or not guilty to the offense charged therein and to a previous conviction or convictions of crime if charged. While the charge remains pending before the magistrate and when the defendant's counsel is present, the defendant may plead guilty to the offense charged, or, with the consent of the magistrate and the district attorney or other counsel for the people, plead nolo contendere to the offense charged or plead guilty or nolo contendere to any other offense the commission of which is necessarily included in that with which he or she is charged, or to an attempt to commit the offense charged and to the previous conviction or convictions of crime if charged upon a plea of guilty or nolo contendere. The magistrate may then fix a reasonable bail as provided by this code, and upon failure to deposit the bail or surety, shall immediately commit the defendant to the sheriff. Upon accepting the plea of guilty or nolo contendere the magistrate shall certify the case, including a copy of all proceedings therein and any testimony that in his or her discretion he or she may require to be taken, to the court in which judgment is to be pronounced at the time specified under subdivision (b), and thereupon the proceedings shall be had as if the defendant had pleaded guilty in that court. This subdivision shall not be construed to authorize the receiving of a plea of guilty or nolo contendere from any defendant not represented by counsel. If the defendant subsequently files a written motion to withdraw the plea under Section 1018, the motion shall be heard and determined by the court before which the plea was entered.

(b) Notwithstanding Section 1191 or 1203, the magistrate shall, upon the receipt of a plea of guilty or nolo contendere and upon the performance of the other duties of the magistrate under this section, immediately appoint a time for pronouncing judgment in the superior court or municipal court and refer the case to the probation officer if eligible for probation, as prescribed in Section 1191.

 **Note.** *The portion of the second sentence, and the fourth sentence, of Section 859a requiring defendant's counsel to be present for the plea is inconsistent with the constitutional*

right of self-representation. Section 859a is also inconsistent with Penal Code Section 1018, which permits a defendant to plead guilty to a noncapital felony after waiving counsel. See People v. Ingels, 216 Cal. App. 3d 1303, 265 Cal. Rptr. 521 (1989).

Penal Code § 859b. Time for preliminary examination

859b. At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, shall set a time for the examination of the case and shall allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. The magistrate shall also issue subpoenas, duly subscribed, for witnesses within the state, required either by the prosecution or the defense.

Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2.

Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur:

(a) The defendant personally waives his or her right to preliminary examination within the 10 court days.

(b) The prosecution establishes good cause for a continuance beyond the 10-court-day period.

For purposes of this subdivision, “good cause” includes, but is not limited to, those cases involving allegations that a violation of one or more of the sections specified in subdivision (a) of Section 11165.1 or in Section 11165.6 has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. Any continuance under this paragraph shall be limited to a maximum of three additional court days.

If the preliminary examination is set or continued beyond the 10-court-day period, the defendant shall be released pursuant to Section 1318 unless:

(1) The defendant requests the setting of continuance of the preliminary examination beyond the 10-court-day period.

(2) The defendant is charged with a capital offense in a cause where the proof is evident and the presumption great.


(3) A witness necessary for the preliminary examination is unavailable due to the actions of the defendant.

(4) The illness of counsel.

(5) The unexpected engagement of counsel in a jury trial.


(6) Unforeseen conflicts of interest which require appointment of new counsel.

The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, unless the defendant personally waives his or her right to a preliminary examination within the 60 days.

 **Note.** The requirement in Section 859b of “not less than two days” to prepare for the preliminary examination conflicts with the “reasonable time” requirement of Section 859, and has been held to be merely directory by *People v. Castaneda*, 190 Cal. App. 3d 961, 235 Cal. Rptr. 740 (1987). The requirement that the preliminary examination be held within ten days of the arraignment “may be tempered by constitutional principles and principles affecting the administration of justice.” *In re Samano*, 31 Cal. App. 4th 989, 494-95, 37 Cal. Rptr. 2d 491 (1995). Section 859b also duplicates some of Section 860.

Penal Code § 860. Examination of case

860. At the time set for the examination of the case, if the public offense is a felony punishable with death, or is 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; provided, however, that a defendant represented by counsel may when brought before the magistrate as provided in Section 858 or at any time subsequent thereto, waive the right to an examination before such magistrate, and thereupon it shall be the duty of the magistrate to make an order holding the defendant to answer, and it shall be the duty of the district attorney within 15 days thereafter, to file in the superior court of the county in which the offense is triable the information; provided, further, however, that nothing contained herein shall prevent the district attorney nor the magistrate from requiring that an examination be held as provided in this chapter.

 **Note.** The provision in Section 860 that the magistrate may postpone the preliminary examination for not less than two nor more than five days appears to conflict with the open-ended “reasonable time” requirement of Section 859. Section 860 also duplicates some of Section 859b.

Penal Code § 861. Examination to be completed at one session; postponement

861. (a) The preliminary examination shall be completed at one session or the complaint shall be dismissed, unless the magistrate, for good cause shown by affidavit, postpones it. The postponement shall not be for more than 10 court days, unless either of the following occur:

(1) The defendant personally waives his or her right to a continuous preliminary examination.

(2) The prosecution establishes good cause for a postponement beyond the 10-court-day period. If the magistrate postpones the preliminary examination beyond the 10-court-day period, and the defendant is in custody, the defendant shall be released pursuant to subdivision (b) of Section 859b.

(b) The preliminary examination shall not be postponed beyond 60 days from the date the motion to postpone the examination is granted, unless by consent or on motion of the defendant.

(c) Nothing in this section shall preclude the magistrate from interrupting the preliminary examination to conduct brief court matters so long as a substantial majority of the court's time is devoted to the preliminary examination.

(d) A request for a continuance of the preliminary examination that is made by the defendant or his or her attorney of record for the purpose of filing a motion pursuant to paragraph (2) of subdivision (f) of Section 1538.5 shall be deemed a personal waiver of the defendant's right to a continuous preliminary examination.

☞ **Note.** *The power of a magistrate under Section 861 to postpone a preliminary examination beyond ten days is limited to those already commenced. Serrato v. Superior Court, 76 Cal. App. 3d 459, 142 Cal. Rptr. 882 (1978).*

Penal Code § 987. Right to counsel

987. (a) In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her.

(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him or her that he or she shall be represented by counsel at all stages of the preliminary and trial proceedings and that the representation is at his or her expense if he or she is able to employ counsel or at public expense if he or she is unable to employ counsel, inquire of him or her whether he or she is able to employ counsel and, if so, whether he or she desires to employ counsel of his or her choice or to have counsel assigned, and allow him or her a reasonable time to send for his or her chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him or her. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel.


The court shall at the first opportunity inform the defendant's trial counsel, whether retained by the defendant or court-appointed, of the additional duties imposed upon trial counsel in any capital case as set forth in paragraph (1) of subdivision (b) of Section 1240.1.

(c) In order to assist the court in determining whether a defendant is able to employ counsel in any case, the court may require a defendant to file a financial statement or other financial information under penalty of perjury with the court or, in its discretion, order a defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to employ his or her own counsel. If a county officer is designated, the county officer shall provide to the court a written recommendation and the reason or reasons in support of the recommendation. The determination by the court shall be made on the record. The financial statement or other financial information obtained from the defendant shall be confidential and privileged and shall not be admissible in evidence in any criminal proceeding except the prosecution

of an alleged offense of perjury based upon false material contained in the financial statement. The financial statement shall be made available to the prosecution only for purposes of investigation of an alleged offense of perjury based upon false material contained in the financial statement at the conclusion of the proceedings for which the financial statement was required to be submitted. The financial statement and other financial information obtained from the defendant shall not be confidential and privileged in a proceeding under Section 987.8.


(d) In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. Any affidavit filed with the court shall be confidential and privileged. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. If the request is denied, the court shall state on the record its reasons for denial of the request.

(e) This section shall remain in effect only until January 1, 2000, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2000, deletes or extends that date.

 **Note.** On January 1, 2000, the fourth sentence of subdivision (c) is amended to add an introductory clause, "Except as provided in Section 1214." Section 1214 concerns execution on a judgment for a fine. Also on January 1, 2000, subdivision (e) is amended to read, "This section shall become operative on January 1, 2000."

Penal Code § 1018. Presence of defendant for plea; counsel

1018. Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel. On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in the case of a defendant who appeared without counsel at the time of the plea the court shall, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

 **Note.** The constitutional right of self-representation does not abrogate the rule of Section 1018 that a guilty plea in a capital case requires consent of counsel. *People v. Chadd*, 28 Cal. 3d 739, 750-52, 621 P.2d 837, 170 Cal. Rptr. 798 (1981).