

Memorandum 2002-52

**Criminal Procedure Under Trial Court Unification
(Staff Draft Tentative Recommendation)**

The Commission is studying whether any criminal trial procedures should be adjusted to account for the effect of trial court unification. In July, the Commission considered a background study on the subject, prepared by Professor Gerald F. Uelmen of the Santa Clara University School of Law: *California Criminal Procedure and Trial Court Unification* (March 2002) (attached to Commission Staff Memorandum 2002-30 (June 20, 2002)). The Commission instructed the staff to prepare a draft tentative recommendation implementing Professor Uelmen's proposals on preliminary examination of felony cases.

Those proposals are as follows (except as indicated, all statutory references in this memorandum are to the Penal Code):

- (1) No changes should be made to existing procedures for superior court review of a magistrate's probable cause determination.
- (2) Amend Section 871.5 to eliminate superior court review of a magistrate's decision on a motion to dismiss or a demurrer.
- (3) Amend Section 995 to eliminate superior court review of a magistrate's decision on a motion to dismiss or a demurrer.
- (4) Amend Sections 859b, 861, 1008, 1381, 1381.5, 1385, 1387, and 1389 to provide that motions to dismiss and demurrers be heard by judges of the superior court, and not by magistrates.
- (5) Amend Section 871.6 to change the jurisdiction for writ relief under that section from the superior court to the court of appeal.

The attached staff draft implements proposals (1), (2), (3), and (5). The merits of proposal (4), and other issues relating to the staff draft are discussed below. After considering this memorandum, the Commission should decide whether to distribute the attached draft, with or without revisions, as its tentative recommendation.

Proposal (4)

In his report to the Commission, Professor Uelmen observes:

If the judicial officer presiding over the preliminary hearing were sitting as a superior court judge, rather than a magistrate, his rulings would not be subject to review by any other judge of the superior court. One superior court judge may not reconsider and overrule a ruling of another superior court judge in the same case. ... When sitting as a magistrate, the judge is no longer sitting as a judge of the superior court, even though the reason [he or she] is eligible to sit as a magistrate is because he or she is a judge of the superior court.

Uelmen, *supra*, at 4.

Professor Uelmen then proposes that the provisions governing a motion to dismiss or a demurrer be amended to provide that the decisionmaker is a judge of the superior court, rather than a magistrate. This would be a purely formal distinction, made to reinforce the idea that such decisions are not subject to review by a judge of the superior court.

The staff has not included these changes in the attached draft, because it is not clear that they are necessary. If the law is revised to expressly provide that certain decisions by a magistrate are not reviewable, then there doesn't seem to be any need to tinker with the judicial status of the decisionmaker. Such changes might have unforeseen consequences (most likely as a result of other provisions referring to the decisionmaker as a "magistrate").

If the Commission decides to implement Professor Uelmen's proposal on this point, the staff will add the necessary language to the tentative recommendation (including any necessary changes to cross references).

Appeal Rights

While the staff draft would eliminate superior court review of certain decisions made by a magistrate in a preliminary examination, there is no intention to eliminate any existing right of review by the court of appeal.

Appeal by the Prosecution

Pursuant to Section 1238(a)(9), the prosecution has the right to appeal "[an] order denying the motion of the people to reinstate the complaint or a portion thereof pursuant to Section 871.5."

The staff draft would narrow the scope of Section 871.5, so that it would be limited to reinstatement of a complaint dismissed for lack of probable cause. If the right to appeal a dismissal is based *solely* on Section 1238(a)(9), then this

narrowing could inadvertently preclude appeal of dismissal based on other grounds. That is not our intention.

It is arguable that Section 1238(a)(1) takes care of the problem. That section provides that the prosecution may appeal “[an] order setting aside all or any portion of the indictment, information, or complaint.” (Emphasis added). If “setting aside” a complaint includes a magistrate’s order dismissing a complaint, then existing law already provides for appeal of all dismissal orders. However, that interpretation is not clear. None of the statutes providing for dismissal by a magistrate uses the term “setting aside” to describe dismissal of the complaint. Nor could the staff find any case authority shedding light on whether Section 1238(a)(1) authorizes appeal of a magistrate’s dismissal of a complaint. This is probably because existing law provides an intermediate remedy — a motion to reinstate the dismissed complaint. The question of whether the dismissal itself can be appealed without first moving for reinstatement may never have come up.

In order to avoid any possibility of limiting existing appeal rights, the staff draft adds subdivision (a)(12), providing for appeal of:

(12) An order dismissing a complaint or a portion of a complaint under Section 859b, 861, 1008, 1381, 1381.5, 1385, 1387, or 1389 of this code, or Section 41403 of the Vehicle Code.

This would clearly establish the prosecution’s right to appeal a dismissal, despite its inability to move for reinstatement under the proposed amendment of Section 871.5.

Appeal by Defendant

Failure to challenge preliminary hearing errors under Section 995 waives the defendant’s right to raise those errors on appeal. See Section 996 (“If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in Section 995.”).

Under the staff draft, Section 995 could not be used to review a magistrate’s erroneous decision on a motion to dismiss or demurrer. In light of that change, Section 996 could perhaps be read to preclude a defendant from appealing a decision on a motion to dismiss or a demurrer. That is not our intention.

To address that possibility, the staff draft would amend Section 996 as follows:

Penal Code § 996 (amended). Waiver of objections

996. (a) If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in Section 995.

(b) This section does not preclude taking an objection that is barred from consideration under subdivision (c) of Section 995.

Comment. Section 996 is amended to create an exception for objections that cannot be raised in a motion to set aside an information under Section 995.

Writ Jurisdiction

The staff draft would amend Section 871.6 to change jurisdiction to issue a writ under that section from the superior court to the court of appeal. However, Section 871.6 was added by initiative. See Prop. 115, approved June 5, 1990. Section 30 of that initiative provides that statutory provisions in the initiative can only be amended by a two-thirds majority in each house or by a statute that becomes effective only when approved by the electors. This could be a problem. If a bill implementing the Commission's recommendation on this subject includes an amendment to Section 871.6, then the bill will require a two-thirds majority for enactment. If there is opposition to the bill, the supermajority requirement might be difficult to meet.

The staff recommends that the amendment to Section 871.6 remain in the tentative recommendation, but that the Commission bear in mind that it may be prudent to drop the provision if significant opposition develops. The other provisions in the staff draft are not dependent on the amendment to Section 871.6.

Respectfully submitted,

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CRIMINAL PROCEDURE UNDER TRIAL COURT UNIFICATION

1

BACKGROUND

2 In 1998, the voters approved Proposition 220, permitting the unification of
3 California's trial courts. The trial courts in all 58 counties have since unified.
4 Some court procedures that made sense under a two-tier trial court system are not
5 well-suited to a unified court system.

6 The Commission is charged with studying whether basic court procedures
7 should be changed in light of court unification.¹ This tentative recommendation
8 proposes changes to the procedure used in the preliminary examination of felony
9 cases.

10 A preliminary examination in a felony case is conducted by a magistrate.² The
11 magistrate's decision is subject to review by a judge of the superior court in the
12 following ways:

13 (1) Under Penal Code Section 871.5, the prosecution may challenge a
14 magistrate's decision to dismiss a complaint. If the superior court judge
15 determines that the magistrate's decision was erroneous as a matter of law, it
16 may reinstate the complaint.

17 (2) Under Penal Code Section 995(a)(2)(A), a defendant may seek superior
18 court review of a magistrate's decision not to dismiss a complaint. If the
19 superior court finds that the magistrate's decision was erroneous, it may set
20 aside the information on the grounds that the defendant was not "legally
21 committed by a magistrate."

22 Under prior law, a judge of the municipal court typically acted as a magistrate.³
23 Thus, preliminary examination involved a two-tier system, with a superior court
24 judge reviewing the decisions of a municipal court judge.

25 Municipal courts no longer exist in California. As a result, a judge of the
26 superior court invariably acts as a magistrate. A superior court judge's decisions in
27 a preliminary examination are reviewed by another judge of the superior court.
28 This is a one-tier, peer review system.

1. Gov't Code § 70219.

2. Cal. Const. art. I, § 14.

3. Uelmen, *Report to Law Revision Commission Regarding California Criminal Procedure and Trial Court Unification* 8 (March 2002).

1 THE PROBLEM

2 **Peer Review Inefficient**

3 Under prior law, superior court review of a magistrate’s decisions provided a
4 relatively low-cost method for identifying and correcting errors. The two-tier
5 system involved review by a “higher” court without resort to the court of appeal.

6 In a unified court, review is not by a higher court. Instead, the matter is
7 considered and decided by two judges of equal rank, without any guarantee that
8 the decision of the reviewing judge will be more reliable than the magistrate’s
9 decision. As Professor Gerald Uelman writes:

10 There is no reason to assume that the superior court judge presiding as
11 magistrate at the preliminary hearing is any less thoughtful or reflective in ruling
12 than another superior court judge might be at a later stage, and counsel preparing
13 and arguing these motions would apparently have the same motivation and skill
14 regardless of the stage at which the motion was decided.⁴

15 A two-step process that is no more accurate than a one-step process is a waste of
16 judicial resources.

17 **Perceived Impropriety**

18 Another problem created by peer review is the potential appearance of
19 impropriety that may follow from judges of the same court reviewing each other’s
20 decisions. Under prior law, parties knew that a problematic magistrate’s decision
21 would be reviewed by a disinterested judge of a different and higher court.

22 Under the peer review process, a magistrate’s decision is reviewed by another
23 judge of the same court. Disgruntled parties may suspect that a decision by a
24 reviewing judge that affirms a magistrate’s decision was influenced by a desire to
25 preserve collegial harmony, or by the knowledge that the roles of magistrate and
26 reviewing judge could be reversed in the future.

27 Regardless of whether peer review creates an actual conflict of interest, even the
28 appearance of impropriety is a problem. Such an appearance could undermine
29 public confidence in the judicial system.

30 PROPOSED LAW

31 **Motion to Dismiss and Demurrer**

32 A magistrate’s decision that is based on a noticed motion and careful
33 deliberation is no less reliable than the decision of another judge of the same court
34 who is reviewing the same record. Requiring that such a decision be made twice,
35 by different judges of the same rank, is duplicative and a waste of judicial
36 resources.

4. *Id.* at 2.

1 The proposed law would eliminate superior court review of a magistrate’s
2 decision on motions to dismiss and demurrers.⁵ Such decisions would be made
3 only once in the superior court.

4 Naturally, some decisions by a magistrate will be erroneous. The best method for
5 correcting such errors is review by the court of appeal. Court of appeal justices
6 specialize in identifying errors in the trial courts. They have no collegial interest in
7 affirming a magistrate’s decision that might create an appearance of impropriety.

8 Under existing law, a magistrate’s decisions are already subject to review by the
9 court of appeal. Elimination of superior court review would not add to the
10 workload of the court of appeal. It would simply eliminate an unnecessary
11 intermediate step.

12 The proposed law preserves existing rights to writ and appellate review of a
13 magistrate’s decision on a motion to dismiss or a demurrer.⁶

14 **Probable Cause Determination**

15 Unlike a noticed motion or demurrer, a routine probable cause determination is
16 often made in an expedited manner, with less thorough preparation by counsel and
17 less time for deliberation.⁷ This is an efficient process that works well in the
18 majority of cases. In the smaller number of more difficult cases, greater care and
19 more thorough deliberation is warranted. This is provided through superior court
20 review of the magistrate’s determination.

21 Because superior court review of a magistrate’s probable cause determination
22 leads to a better result, it should be preserved. The proposed law would not affect
23 existing procedures for review of a magistrate’s determination of probable cause.

24 **Writ Procedure**

25 Under Penal Code Section 871.6, either party may seek a writ to compel a
26 magistrate to proceed with a preliminary examination. The superior court has
27 jurisdiction over such writs. Now that the courts have unified, this is a peer review
28 process, with a judge of the superior court issuing a writ to another judge of the
29 same court. This creates a potential appearance of impropriety.

30 The proposed law would shift jurisdiction over Section 871.6 writs from the
31 superior court to the court of appeal. While this would increase the caseload of the
32 court of appeal, it would not significantly increase the court’s workload, for two
33 reasons:

34 (1) These writ petitions are likely to be relatively rare.⁸ If a defendant is in
35 custody, the timing defect to be remedied by the writ is also grounds for dismissal

5. See proposed amendments to Penal Code §§ 871.5, 995.

6. See proposed amendments to Penal Code §§ 996, 1238.

7. Uelmen, *supra* note 3, at 6.

8. Superior court workload statistics on the incidence of such writs are unavailable.

1 of the complaint under Penal Code Section 859b. Most defendants will opt to
2 move for dismissal rather than petition for a writ under Section 871.6.

3 (2) A Section 871.6 petition does not involve difficult issues. The only question
4 presented is whether the magistrate has violated the statutory deadlines imposed
5 by Section 859b or has continued the proceeding without good cause. Such
6 straightforward questions require little time or effort to resolve. Nor would there
7 be disruption of existing court procedures if these petitions were added to the
8 court's jurisdiction. The court already has jurisdiction to review petitions for
9 nearly identical writs authorized under Penal Code Section 1511.⁹ The procedures
10 for review of Section 1511 petitions are adaptable for use in review of Section
11 871.6 petitions.

9. Penal Code Section 1511 provides for a writ from the court of appeal compelling a superior court to proceed with a felony trial that has been unlawfully delayed. Prior to trial court unification, Sections 871.6 and 1511 were structurally parallel, in that each provided for a petition to a higher court — a two tier process. As a consequence of trial court unification, Section 871.6 is now a peer review process. The proposed law would restore the original parallelism between Sections 871.6 and 1511.

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PROPOSED LEGISLATION

1 **Penal Code § 871.5 (amended). Reinstatement of dismissed complaint**

2 SEC. _____. Section 871.5 of the Penal Code is amended to read:

3 871.5. (a) When an action is dismissed by a magistrate pursuant to Section 859b,
4 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389 of this code or Section 41403
5 of the Vehicle Code, or a portion thereof is dismissed pursuant to those same
6 sections that section which may not be charged by information under Section 739,
7 the prosecutor may make a motion in the superior court within 15 days to compel
8 the magistrate to reinstate the complaint or a portion thereof and to reinstate the
9 custodial status of the defendant under the same terms and conditions as when the
10 defendant last appeared before the magistrate.

11 (b) Notice of the motion shall be made to the defendant and the magistrate. The
12 only ground for the motion shall be that, as a matter of law, the magistrate
13 erroneously dismissed the action or a portion thereof.

14 (c) The superior court shall hear and determine the motion on the basis of the
15 record of the proceedings before the magistrate. If the motion is litigated to
16 decision by the prosecutor, the prosecution is prohibited from refileing the
17 dismissed action, or portion thereof.

18 (d) Within 10 days after the magistrate has dismissed the action or a portion
19 thereof, the prosecuting attorney may file a written request for a transcript of the
20 proceedings with the clerk of the magistrate. The reporter shall immediately
21 transcribe his or her shorthand notes pursuant to Section 869 and file with the
22 clerk of the superior court an original plus one copy, and as many copies as there
23 are defendants (other than a fictitious defendant). The reporter shall be entitled to
24 compensation in accordance with Section 869. The clerk of the superior court shall
25 deliver a copy of the transcript to the prosecuting attorney immediately upon its
26 receipt and shall deliver a copy of the transcript to each defendant (other than a
27 fictitious defendant) upon his or her demand without cost.

28 (e) When a court has ordered the resumption of proceedings before the
29 magistrate, the magistrate shall resume the proceedings and when so ordered, issue
30 an order of commitment for the reinstated offense or offenses within 10 days after
31 the superior court has entered an order to that effect or within 10 days after the
32 remittitur is filed in the superior court. Upon receipt of the remittitur, the superior
33 court shall forward a copy to the magistrate.

34 (f) Pursuant to paragraph (9) of subdivision (a) of Section 1238 the people may
35 take an appeal from the denial of the motion by the superior court to reinstate the
36 complaint or a portion thereof. If the motion to reinstate the complaint is granted,
37 the defendant may seek review thereof only pursuant to Sections 995 and 999a.
38 That review may only be sought in the event the defendant is held to answer
39 pursuant to Section 872.

1 (g) Nothing contained herein shall preclude a magistrate, upon the resumption of
2 proceedings, from considering a motion made pursuant to Section 1318.

3 (h) If the superior court grants the motion for reinstatement and orders the
4 magistrate to issue an order of commitment, the defendant, in lieu of resumed
5 proceedings before the magistrate, may elect to waive his or her right to be
6 committed by a magistrate, and consent to the filing of an amended or initial
7 information containing the reinstated charge or charges. After arraignment
8 thereon, he or she may adopt as a motion pursuant to Section 995, the record and
9 proceedings of the motion taken pursuant to this section and the order issued
10 pursuant thereto, and may seek review of the order in the manner prescribed in
11 Section 999a.

12 **Comment.** Section 871.5 is amended to limit the scope of this section to reinstatement of a
13 complaint dismissed under Section 871. A complaint dismissed under Section 859b, 861, 1008,
14 1381, 1381.5, 1385, 1387, or 1389 of this code, or under Section 41403 of the Vehicle Code may
15 not be reinstated under this section. Nothing in this section precludes filing a new action for an
16 offense charged in a dismissed complaint. But see Sections 1387-1387.2 (bar to prosecution of
17 dismissed action).

18 **Penal Code § 871.6 (amended). Writ relief for untimely preliminary examination**

19 SEC. ____ Section 871.6 of the Penal Code is amended to read:

20 871.6. (a) If in a felony case the magistrate sets the preliminary examination
21 beyond the time specified in Section 859b, in violation of Section 859b, or
22 continues the preliminary hearing without good cause and good cause is required
23 by law for such a continuance, the people or the defendant may file a petition for
24 writ of mandate or prohibition in the ~~superior court~~ court of appeal seeking
25 immediate appellate review of the ruling setting the hearing or granting the
26 continuance. Such a petition shall have precedence over all other cases in the court
27 to which the petition is assigned. If the ~~superior court~~ court of appeal grants a
28 peremptory writ, it shall issue the writ and a remittitur three court days after its
29 decision becomes final as to the court if this action is necessary to prevent
30 mootness or to prevent frustration of the relief granted, notwithstanding the rights
31 of the parties to ~~seek review in a court of appeal~~ file a petition for review in the
32 Supreme Court. When the ~~superior court~~ court of appeal issues the writ and
33 remittitur as provided in this section, the writ shall command the magistrate to
34 proceed with the preliminary hearing without further delay, other than that
35 reasonably necessary for the parties to obtain the attendance of their witnesses.

36 (b) The ~~court of appeal~~ Supreme Court may stay or recall the issuance of the writ
37 and remittitur. The failure of the ~~court of appeal~~ Supreme Court to stay or recall
38 the issuance of the writ and remittitur shall not deprive the parties of any right they
39 would otherwise have to appellate review or extraordinary relief.

40 **Comment.** Section 871.6 is amended to transfer jurisdiction for writ review of an untimely
41 preliminary examination from the superior court to the court of appeal. Cf. Section 1511 (writ
42 relief for untimely trial of felony case).

1 **Penal Code § 995 (amended). Setting aside an information**

2 SEC. _____. Section 995 of the Penal Code is amended to read:

3 995. (a) Subject to subdivision (b) of Section 995a, the indictment or information
4 shall be set aside by the court in which the defendant is arraigned, upon his or her
5 motion, in either of the following cases:

6 (1) If it is an indictment:

7 (A) Where it is not found, endorsed, and presented as prescribed in this code.

8 (B) That the defendant has been indicted without reasonable or probable cause.

9 (2) If it is an information:

10 (A) That before the filing thereof the defendant had not been legally committed
11 by a magistrate.

12 (B) That the defendant had been committed without reasonable or probable
13 cause.

14 (b) In cases in which the procedure set out in subdivision (b) of Section 995a is
15 utilized, the court shall reserve a final ruling on the motion until those procedures
16 have been completed.

17 (c) This section may not be used to review a magistrate's decision under Section
18 859b, 861, 1008, 1381, 1381.5, 1385, 1387, or 1389 of this code, or under Section
19 41403 of the Vehicle Code.

20 **Comment.** Section 995 is amended to preclude review of specific decisions made by a
21 magistrate. This does not preclude review of matters that could have been decided by a magistrate
22 but were not.

23 **Penal Code § 996 (amended). Waiver of objections**

24 SEC. _____. Section 996 of the Penal Code is amended to read:

25 996. (a) If the motion to set aside the indictment or information is not made, the
26 defendant is precluded from afterwards taking the objections mentioned in
27 subdivision (a) of Section 995.

28 (b) This section does not preclude taking an objection to a decision mentioned in
29 subdivision (c) of Section 995.

30 **Comment.** Section 996 is amended to create an exception for objections that cannot be raised
31 in a motion to set aside an information under Section 995.

32 **Penal Code § 1238 (amended). Appeal by the people**

33 SEC. _____. Section 1238 of the Penal Code is amended to read:

34 1238. (a) An appeal may be taken by the people from any of the following:

35 (1) An order setting aside all or any portion of the indictment, information, or
36 complaint.

37 (2) An order sustaining a demurrer to all or any portion of the indictment,
38 accusation, or information.

39 (3) An order granting a new trial.

40 (4) An order arresting judgment.

41 (5) An order made after judgment, affecting the substantial rights of the people.

1 (6) An order modifying the verdict or finding by reducing the degree of the
2 offense or the punishment imposed or modifying the offense to a lesser offense.

3 (7) An order dismissing a case prior to trial made upon motion of the court
4 pursuant to Section 1385 whenever such order is based upon an order granting the
5 defendant's motion to return or suppress property or evidence made at a special
6 hearing as provided in this code.

7 (8) An order or judgment dismissing or otherwise terminating all or any portion
8 of the action including such an order or judgment after a verdict or finding of
9 guilty or an order or judgment entered before the defendant has been placed in
10 jeopardy or where the defendant has waived jeopardy.

11 (9) An order denying the motion of the people to reinstate the complaint or a
12 portion thereof pursuant to Section 871.5.

13 (10) The imposition of an unlawful sentence, whether or not the court suspends
14 the execution of the sentence, except that portion of a sentence imposing a prison
15 term which is based upon a court's choice that a term of imprisonment (A) be the
16 upper, middle, or lower term, unless the term selected is not set forth in an
17 applicable statute, or (B) be consecutive or concurrent to another term of
18 imprisonment, unless an applicable statute requires that the term be consecutive.
19 As used in this paragraph, "unlawful sentence" means the imposition of a sentence
20 not authorized by law or the imposition of a sentence based upon an unlawful
21 order of the court which strikes or otherwise modifies the effect of an
22 enhancement or prior conviction.

23 (11) An order recusing the district attorney pursuant to Section 1424.

24 (12) An order dismissing a complaint or a portion of a complaint under Section
25 859b, 861, 1008, 1381, 1381.5, 1385, 1387, or 1389 of this code, or under Section
26 41403 of the Vehicle Code.

27 (b) If, pursuant to paragraph (8) of subdivision (a), the people prosecute an
28 appeal to decision, or any review of such decision, it shall be binding upon them
29 and they shall be prohibited from refileing the case which was appealed.

30 (c) When an appeal is taken pursuant to paragraph (7) of subdivision (a), the
31 court may review the order granting the defendant's motion to return or suppress
32 property or evidence made at a special hearing as provided in this code.

33 (d) Nothing contained in this section shall be construed to authorize an appeal
34 from an order granting probation. Instead, the people may seek appellate review of
35 any grant of probation, whether or not the court imposes sentence, by means of a
36 petition for a writ of mandate or prohibition which is filed within 60 days after
37 probation is granted. The review of any grant of probation shall include review of
38 any order underlying the grant of probation.

39 **Comment.** Section 1238 is amended to preserve the right to appeal decisions that were
40 formerly subject to a motion to reinstate a complaint under Section 871.5, and were therefore
41 subject to appeal under subdivision (a)(9).