Study M-1330 May 22, 2003

Memorandum 2003-13

Criminal Procedure Under Trial Court Unification (Comments on Tentative Recommendation)

In November 2002 the Commission approved circulation of a tentative recommendation relating to *Criminal Procedure Under Trial Court Unification*. We have received several letters commenting on the tentative recommendation, which are attached in the Exhibit as follows:

Issues raised in the letters are discussed below. After considering these issues, the Commission needs to decide whether to adopt the tentative recommendation as its final recommendation, with or without changes.

BACKGROUND

In 1998, the voters approved Proposition 220, permitting the unification of California's trial courts. The trial courts in all 58 counties have since unified. Some court procedures that made sense under a two-tier trial court system may not be suited to a unified court system. The Commission is charged with studying whether basic court procedures should be changed in light of trial court unification.

The Commission contracted with Professor Gerald Uelmen, of Santa Clara University School of Law, to prepare a background study on criminal procedure after trial court unification: *California Criminal Procedure and Trial Court Unification* (March 2002) ("Background Study"). The background study focused on the preliminary examination of felony cases.

A preliminary examination is held to determine whether there is probable cause to believe that the defendant has committed a felony. A magistrate's decisions in the preliminary examination are subject to review by a judge of the superior court as follows:

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

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

Before trial court unification, magistrates were typically judges of the municipal court. After unification, magistrates are invariably superior court judges. What used to be a two-tiered system, with decisions of a municipal court judge reviewed by a superior court judge, is now a peer review system. The initial decisions of a superior court judge are subject to review by another judge of the superior court.

Review of legal rulings of one superior court judge by another judge of the same court could create an appearance of impropriety and an actual risk of bias. Furthermore, having two judges of equal rank hear and decide the same issue separately is duplicative and could undermine the principal purpose of trial court unification — judicial efficiency and economy.

The background study differentiates between two different types of magistrate's decisions: probable cause determinations and decisions on a noticed motion to dismiss or a demurrer. Superior court review of probable cause determinations should be preserved, because

> preliminary hearings are processed quickly on an assembly line basis, with minimal preparation by the lawyers. The deputy public defenders and deputy district attorneys handling the calendar of preliminary hearings do not anticipate trying the case themselves, and rarely research the elements with respect to each discrete count of a multi-count complaint. The judge presiding at the preliminary hearing as magistrate is frequently called upon to make snap decisions, with little time for thoughtful reflection or research.

Background Study at 6.

If superior court review of probable cause decisions were eliminated, greater time and effort would need to be invested in the preliminary examination. This would be inefficient, as it would require a greater commitment of resources to *all* cases, including those that never proceed to trial (e.g., a case settled by plea bargain). The existing system conserves resources by requiring a significant commitment of resources only in the minority of cases that warrant it.

Rulings on noticed motions to dismiss and demurrers are "fundamentally different":

> The arguments with respect to efficient "assembly-line" processing of probable cause determinations, and the low risk of bias or resentment in peer review of those determinations, do not seem applicable to motions to dismiss the complaint on these other grounds. There is no reason to assume that the superior court judge presiding as magistrate at the preliminary hearing is any less thoughtful or reflective in ruling than another superior court judge might be at a later stage, and counsel preparing and arguing these motions would apparently have the same motivation and skill regardless of the stage at which the motion was decided. Thus, even if we permit a magistrate's probable cause determinations to be reviewed pursuant to Penal Code Section 995(a)(2)(B) and Section 871.5, it may be desirable to preclude rehearing in the trial court of other motions to dismiss determined by the preliminary hearing judge. All of the considerations relating to peer review and judicial efficiency strongly support such a change. Rulings on noticed motions are fundamentally different than routine determinations of probable cause.

Background Study at 7.

The background study recommends that superior court review of a magistrate's decisions on a noticed motion to dismiss or demurrer be eliminated. Review of such decisions would be in the court of appeal. Superior court review of probable cause determinations would be preserved. See Background Study at 13.

Under Penal Code Section 871.6, either party may seek a writ to compel a magistrate to proceed with a preliminary examination that has been delayed. Before trial court unification these writs were issued by superior court judges to municipal court judges. Since unification, the writs are issued by superior court judges to other judges of the same court. This raises the same peer review concerns discussed above. The background study recommends that Section 871.6

be amended to shift jurisdiction to the court of appeal. See Background Study at 11, 13.

The background study was sent to the California Judges Association, California Attorneys for Criminal Justice, the California Public Defenders Association, the California District Attorneys Association, the Attorney General's office, the Criminal Law Section of the State Bar of California, and the various criminal defense "Appellate Projects" for review and comment. Despite this broad circulation, the Commission received only two comments on the background study. The Attorney General's office indicated that it generally supported the recommendations made in the study, but would need to "carefully review the specific language of any proposed legislation." See Staff Memorandum 2002-30 (June 20, 2002). A staff attorney for the Criminal Law Advisory Committee of the Judicial Council indicated that the members of that committee found the general recommendations made in the background study to be "a very practical and common sense approach."

Based in part on these favorable reactions, the Commission prepared a tentative recommendation setting out specific statutory changes and circulated it for public comment.

GENERAL REACTION

We received comments from three defense attorneys (one of them, Mark Overland, a Commission consultant on criminal sentencing), the District Attorney of San Diego County, and the Appellate Courts Committee of the California Judges Association. These commentators represent a good cross-section of the different interests that would be affected by the proposed law.

None of the commentators support the proposed law. In general, their criticisms address the policy assumptions underlying the proposed law rather than details of implementation. Commentators dispute the existence of any significant peer review problem and argue that the proposed law would degrade, rather than improve, procedural efficiency. Because the commentators raise objections to the overall purpose and effect of the proposed law, rather than specific defects in its implementation, it is difficult to see how the proposal could be refined to address their concerns.

PEER REVIEW

Review of legal rulings of one superior court judge by another judge of the same court could create an appearance of impropriety and an actual risk of bias. The Commission has previously expressed concern about peer review in the superior court appellate division:

> The primary concern with appellate jurisdiction within the unified court is the problem of conflicts of interest arising in peer review. A judge should not be in a position of having to reverse a judge of equal rank. There may be a collegiality or deference on the court that will destroy the independent judgment necessary for a fair review.

24 Cal. L. Revision Comm'n Reports 1, 30 (1994).

In 2001, a Judicial Council task force issued a report on the appellate division of the superior court. See Judicial Council, Ad Hoc Task Force on Superior Court Appellate Divisions, Report to the Appellate Process Task Force on the Superior Court Appellate Divisions (May 2001). The report agreed with the Commission's concern about peer review in the appellate division of the superior court:

> the Appellate Division Task Force concludes that the appearance of impartial appellate justice at the superior court level is seriously threatened in many counties because of (1) negative perceptions associated with "peer review" (i.e., judges on the appellate division of a superior court reviewing decisions by their colleagues on the same superior court), and (2) the frequency with which appellate division judges in many counties have disqualifying conflicts arising out of prior involvement with a case.
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> …
>
> Having examined the operation of appellate divisions around the State, it is clear that the appearance of impartial appellate justice is undermined by the current structure, particularly in counties with relatively few superior court judges.

Id at 9.

The Commission again expressed concern about peer review in its tentative recommendation on *Appellate and Writ Review Under Trial Court Unification* (Nov. 2001). In response to that tentative recommendation, the Commission received a number of comments from judges suggesting that peer review in the appellate division of the superior court is not a serious problem. See Commission Staff Memorandum 2002-22 (May 1, 2002).

The Commission is currently awaiting the results of a Judicial Council survey of attorney perceptions of peer review in the appellate division of the superior court. That study may provide an empirical basis for judging the seriousness of the peer review problem.

The comments received in response to the tentative recommendation on *Criminal Procedure Under Trial Court Unification*, suggest that peer review in the superior court is not creating problems and that peer review is a pervasive feature of the judicial process. These comments are discussed in more detail below.

Peer Review Accepted Practice in Academia

Mr. Lovett notes that peer review is a common method for reviewing the work of academic experts and is not inherently problematic (Exhibit p. 5): "There is nothing inherently wrong with peer review. In medicine and science peer review is the accepted norm."

However, academic peer review differs in a significant way from judicial peer review — academic peer review typically involves anonymous reviewers. The prevalence of anonymity in academic peer review suggests that the academic community sees the same inherent risk in peer review that concerns the Commission. A cursory Internet search of scientific journal peer review policies found repeated expressions of the need for anonymity in order to preserve reviewers' candor and objectivity. See, e.g., <http://www.acponline.org/journals/annals/01jan98/masking.htm> ("the principal argument in favor of [anonymity] is that the signing of reviews would inhibit reviewers from being open and probing in their critiques … this would clearly not be in the best interests of good science.").

Peer Review Concerns Exaggerated

Justice Boren believes that concern about the perception of impropriety resulting from superior court review of a magistrate's decisions is significantly exaggerated (Exhibit p. 9):

> While perceptions exist that peer review within the superior courts is improper, such perceptions are not significant except in an academic sense. More importantly, they are unreasonable as to review respecting Penal Code section 995. The present process gives litigants two bites of the apple in the trial court and still allows appellate review. We believe that litigants and counsel would much rather have the two bites than eliminate one of the

> bites for the mere sake of erasing a perception in a narrow area or a claimed inefficiency. We also note that, even after unification, trial court judges often wear multiple hats in a variety of situations. With respect to 995 motions, superior court judges have, for the most part, always reviewed the decisions of other judges with whom they were acquainted. The cited perception ignores the pride and independence most trial judges display in making such decisions and operating their individual courtrooms.

Three general points can be derived from Justice Boren's remarks:

(1) Concerns about peer review are "academic" only. This contention is difficult to evaluate without empirical evidence. If the Commission's decisions regarding the proposed law hinge on whether concerns about peer review are widely held, it might make sense to delay a final decision until the results of the Judicial Council survey are available for analysis.

(2) Even if litigants have doubts about the effectiveness of peer review, they would still prefer to have a second bite at the apple. This may well be true. Individual litigants disappointed by a decision on review might complain of bias in a particular case, but litigants as a class are probably glad to have a second chance at dismissal or reinstatement of a complaint. If the second bite produces results you are better off than you were; if it fails to produce results you are no worse off than before. The separate question of whether giving two bites is a good use of judicial resources is discussed later in this memorandum.

(3) Any perception of impropriety is unreasonable. Judges' professionalism and independence enable them to review decisions made by their colleagues without any impropriety. The staff agrees that actual bias is probably rare, because of the pride, independence, and professionalism of judges. However, even the appearance of impropriety in the criminal justice system is cause for concern.

Mr. Ingber believes that some perception of impropriety is inherent in peer review (Exhibit p. 3): "You will never erase the potential for the appearance of impropriety so long as judges feel like brethren in the same fraternity. Make the reviewing judge more qualified and the appearance of impropriety will be diminished — but it will never go away." However, he does not suggest that the peer review problem is serious enough to justify the changes in the proposed law.

Peer Review Pervasive in Judicial System

Mr. Lovett and Justice Boren both note that peer review is a common feature of the judicial process. Mr. Lovett writes (Exhibit pp. 5-6):

> Peer review pervades the judicial system and will continue to do so.
>
> The proposed amendments do not eliminate peer review from the superior court. One superior court judge will still review the actions of another superior court judge on questions of probable cause and lawful commitment under section 995, in renewed motions to suppress evidence under section 1538.5, subdivision (i), in every motion attacking the validity of a search warrant issued by a magistrate, and with numerous non-binding common law motions. Peer review will continue to occur when the appellate department of [the] superior court decides misdemeanor appeals and when the superior court considers petitions for extraordinary relief arising from misdemeanor cases.
>
> A peer review process regularly occurs in our Courts of Appeal and Supreme Court. In the Court of Appeal, for example, three justices of equal status decide issues by agreeing or disagreeing on its resolution. In this process they may accept or reject relevant published opinions from other districts or divisions of the court or from other panels in the same district and division. They do this while maintaining collegiality and without a hint of impropriety.

Justice Boren makes a similar point, at Exhibit p. 10:

> A cursory review of California trial court procedure illustrates that peer review (i.e., a superior court judge revisiting an issue previously determined by another superior court judge) occurs regularly and without suggestion of impropriety. Here are a few examples:
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> a. A CCP § 438(g) judgment on the pleadings may follow a prior decision overruling a demurrer.
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> b. CCP § 170.3 motions to disqualify (in which the Chief Justice frequently assigns a judge from another county) are not technically decided in the same court but the reviewing judge has the same jurisdictional power and the practical effect is that the reviewing judge determines whether the challenged judge is disqualified. (If the challenged judge thought he or she was disqualified, the judge would have accepted the challenge. The issue of deference to a colleague is similar.)
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> c. Under CCP § 170.3(b)(4) when a judge disqualifies him/herself after having made rulings in a case, and the disqualification is based on matters learned after those rulings, the

successor judge may for good cause set aside the rulings that the disqualified judge made previously.

d. Generally, if a different judge tries a case after remand following an appeal, that judge is not bound by the first judge's rulings. In fact, CCP § 170.1 permits an appellate court to direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court. Generally, pretrial rulings such as motions in limine made by one judge, are not binding on a successor judge if for some reason the first judge does not try the case (reallocation of the court's workload, change of assignment, incapacity, retirement, death, etc.). (See 2 Witkin, California Procedure (4th ed. 1997) Courts § 237. But see *In re Alberto* (2002) 102 Cal. App. 4th 421 [second judge may not review bail decision of first judge].)

e. Penal Code § 1538.5 also presents a number of peer review situations. Subdivisions (h), (i) and (j) control trial court review after search and seizure decisions by the magistrate during a preliminary examination.

Not all of the examples are exactly on point. For example, Justice Boren notes that a judgment on the pleadings can follow another judge's decision overruling a demurrer. However, this is true only if "there has been a material change in applicable case law or statute since the ruling on the demurrer." Code Civ. Proc. § 438(g). In such a case, the judgment on the pleadings is being decided on materially different law than that applied in the prior judge's decision. Such a decision can be made without a necessary implication that the prior judge erred (presumably resulting in less friction between colleagues).

Nonetheless, the commentators do provide several examples of peer review in the superior court that would not be affected by the proposed law. Two points might be inferred from these examples: (1) the proposed law does not solve the perceived peer review problem because it leaves many peer review procedures in place, (2) peer review is a widely accepted practice that is not creating problems.

The first point is not persuasive. Many reforms are incremental, solving part but not all of a problem. If the proposed law is an appropriate reform in the narrow area that it addresses, then it should not be set aside merely because it does not address all areas.

The second point should be kept in mind. In light of how common peer review mechanisms seem to be, one would expect there to have been broad criticism if peer review were actually creating significant problems. Of course, peer review of a magistrate's decision and peer review in the appellate division

of the superior court are relatively new, having resulted from trial court unification, so there may not have been time for concerns about peer review of a magistrate's decisions to have reached critical mass. Notably, peer review in the appellate division *has* been criticized by both the Commission and the Judicial Council Ad Hoc Task Force on Superior Court Appellate Divisions.

Still, the fact that peer review is a prominent feature of existing judicial processes, without any obvious groundswell of concern from practitioners, does suggest that this may be an area that "ain't broke." The Judicial Council survey data would be helpful in testing that proposition.

Conclusion

The comments received question whether peer review of a magistrate's decisions is enough of a problem to justify the proposed law. The lack of support for that proposition is significant. It may reflect a more general perception that peer review of a magistrate's decision is not a serious problem.

On the other hand, both the Commission and the Judicial Council Ad Hoc Task Force on Superior Court Appellate Divisions have concluded that peer review in the appellate division of the superior court may lead to a perception of impropriety or actual bias. That view is consistent with the approach taken in academic peer review, where anonymous review is used to shield reviewers from collegial pressures.

Even if the Commission is persuaded that the peer review problem is not significant, the proposed law may still be an appropriate step towards procedural efficiency in a unified trial court.

PROCEDURAL EFFICIENCY

The second major policy assumption underlying the proposed law is that superior court review of decisions of a magistrate on noticed motions and demurrers is needlessly duplicative. As noted on page 2 of the background study:

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

If that is correct, what purpose is served by having the same motion decided twice by judges of the same rank and the same court? If the magistrate makes an error, the aggrieved litigant can appeal. The Commission had tentatively concluded that elimination of this duplicative review would increase procedural efficiency in the unified courts.

The comments that we received assert that the proposed law would not improve efficiency, but would actually decrease efficiency significantly.

Quality of Magistrate's Decision

The efficiency rationale is based on the assumption that one superior court judge is as qualified as another to make the decisions required of a magistrate. Mr. Overland disputes that assumption, at Exhibit p. 1:

> Having practiced criminal defense for over thirty-five years, it seems to me that although theoretically sound, the proposed amendments overlook the reality of daily practice.
>
> In theory, Professor Uelmen is correct that "there is no reason to assume that the superior court judge presiding as magistrate at the preliminary hearing is any less thoughtful or reflective" than another judge of the same court. In practice, however it is clear that judges with little or no criminal experience in felony matters are assigned to handle preliminary hearings. Indeed, the legislative fiat of unification has not transformed these magistrates into more experienced trial judges.
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> …
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> Until such time as the judges assigned as magistrates are actually as "thoughtful or reflective in ruling" as their more experienced counterparts, the limited protection afforded to both defendants and the prosecution by these existing statutes should not be eroded.

Mr. Overland's remarks suggest that preliminary examinations are generally assigned to less experienced judges, with review of alleged magistrate errors assigned to judges with more experience. If this is so, then the courts are replicating the two-tiered model that existing before trial court unification, but within the unified superior court. Such an approach might well be seen by courts as an efficient way to divide responsibilities between judges with different levels of experience. The staff does not know whether such a practice is widespread.

Mr. Lovett writes, at Exhibit p. 7:

> [It] has been my experience that section 871.5 motions [for reinstatement of a dismissed complaint] are often better briefed and

> argued than the original motion. By then both parties have had more time to consider and reflect upon their respective positions. While the magistrate may be as reflective and thoughtful as an 871.5 judge, the latter will also have had more time to consider the issue. This is especially so with section 1385 motions which, before a magistrate, typically are oral rather than written and decided summarily.

Mr. Lovett's remarks do not address the relative levels of experience of the magistrate and the reviewing judge. Instead, he suggests that the preliminary examination *process* results in less fully developed motions being presented to a magistrate than are presented to a judge reviewing the magistrate's decision.

The proposed law provides a partial remedy to this procedural problem in that it does not require that a motion to dismiss or demurrer be filed during the preliminary examination. The defendant could elect to hold off until after an information has been filed and then move for dismissal of the information under Penal Code Section 995. That would allow more time for deliberation and briefing (and would put the decision before the more experienced judge, if Mr. Overland's description of court practice is correct).

Overall, the remarks of Mr. Overland and Mr. Lovett suggest that, as a practical matter, the two-tiered preliminary examination process continues to some extent in the unified courts and that there may be good reasons to preserve that system. It allows for an efficient division of labor — with less experienced judges making routine decisions in an expedited process and more experienced judges correcting any errors that result.

Workload of Trial Court

Mr. Overland writes at Exhibit p. 1: "The Commission also ignores the effect of the proposed change on the caseload of the trial court. Faced with an erroneous ruling by an inexperienced magistrate, defense counsel will either proceed to trial, having no alternative in the trial court, or seek review in the appellate court."

It is obviously more efficient to dismiss a defective case before trial than it would be to conduct a trial. The question then is what percentage of magistrate decisions are reversed under Penal Code Section 995? If reversals are rare, the efficiency gains achieved by eliminating Section 995 review could outweigh the cost of trying the small number of cases that might otherwise have been dismissed. That analysis is based only on cost considerations and does not take

into account the extended deprivation of liberty that some innocent defendants would endure while their cases are tried. Unfortunately, Judicial Council court statistics do not provide data on the incidence of Section 995 motions or the rate of dismissal under that section.

Superior Court Review More Efficient Than Appellate Review

One feature of the proposed law is that it would preserve existing rights of appeal — while the second bite in the superior court would be eliminated, parties could still appeal an erroneous magistrate's decision. We received a number of comments suggesting that review in the superior court is considerably more efficient than an appeal. Mr. Lovett writes, at Exhibit p. 6:

> Both Sections 871.5 and 995 provide a low-cost, speedy, and efficient means of identifying and correcting judicial error during the normal course of ongoing felony prosecution.
>
> Section 871.5 provides a speedier remedy than review by the Court of Appeal. Resolution of an 871.5 motion takes weeks or months as opposed to years for an appeal. And while the motion is pending, the case continues to wend towards trial. But an appeal deprives the superior court of jurisdiction and thus halts trial proceedings until the appeal is resolved. Full briefing in the Court of Appeal commonly takes more than 90 days, and that is after the record is prepared and certified. Next a case is calendared for oral argument and then decided within 90 days of being submitted after argument. Finally, 60 days must pass after an opinion is filed before the case is remitted back to the superior court. A petition for writ of mandate or prohibition is not much speedier and has the added disadvantage to the parties of being heard only at the court's discretion.
>
> Your proposal will shift the cost of review from the superior court to the Court of Appeal and will likely [increase] the cost. Most 871.5 motion issues never reach the Court of Appeal. A filtering process occurs as a criminal case [progresses] from complaint, to information, and to resolution. Many of the issues arising early in the prosecution go away over time. Thus, not every section 871.5 order is reviewed by an appellate court. Curtailing the section 871.5 motion process will increase Court of Appeal workload by increasing the number of 871.5 issues that court must resolve. And each 871.5 issue on appeal will be considered by three justices who must decide the issue by a written opinion rather than by a single judge who can decide the motion orally.

Justice Boren raises similar points. See generally Exhibit pp. 11-12.

Resolution in the superior court is obviously more efficient than resolution in the court of appeal. Does this mean that all superior court decisions should be subject to review by a second judge of the superior court, in order to avoid costly appeals? Obviously not. The cost of rehearing all decisions would far outweigh any savings resulting from the detection and resolution of a relatively small number of errors at the trial court level. Unless magistrate's decisions are subject to a significantly higher rate of error than other superior court decisions, the staff does not see why they should be treated differently.

Of course, the comments of Mr. Overland and Mr. Lovett suggest that magistrate decisions *are* significantly less reliable than other superior court decisions — because of the relative inexperience of magistrates and the expedited nature of the preliminary examination process. To the extent that this is correct, a comparison between the cost of resolution in the superior court and resolution in the court of appeal is appropriate, and existing law would be more efficient than the proposed law.

Appellate Review Impediment to Settlement

Justice Boren writes, at Exhibit p. 12:

> Under the CLRC proposal, when a case is challenged on procedural grounds … and review in the Court of Appeal is undertaken, that case will come to a standstill in the trial court as jurisdiction will reside in the appellate court. More importantly, counsel for the parties will not come into direct contact with each other as they do when proceedings remain in the lower courts. Because they will not meet with each other and with the trial judge, a significant stage of case settlement will be eliminated or substantially delayed. Presently, cases that acquire procedural baggage often present an opportunity for open discussion of the general merits of the matter. Such discussions include an evaluation of the pros and cons of refiling the case. With or without the interaction of the trial judge, many such matters are settled at this stage. Direct review by the Court of Appeal bypasses this stage and will make such settlement much more difficult and probably less frequent.

Mr. Ingber makes a similar point, suggesting that Section 995 review can expose weaknesses in a case that might lead to settlement. See Exhibit p. 3.

This is an interesting point that does weigh in favor of preserving existing law.

OTHER CONCERNS

In addition to comments disputing the efficiency and peer review rationales for the proposed law, we also received comments objecting to the effect of the proposed law on the workload of the court of appeal and suggesting that the proposed law creates an advantage for prosecution.

Court of Appeal Workload

Mr. Overland writes, at Exhibit p. 1: "[The] Commission's statement … that elimination of superior court review would not add to the workload of the appellate courts is optimistic at best." Mr. Lovett suggests that matters currently resolved through superior court review will shift to the court of appeal. See Exhibit p. 6.

Justice Boren estimates that 90% of Section 995 motions are based on claims of lack of probable cause. See Exhibit p. 11. Those motions would not be affected by the proposed law. Therefore, only a small percentage of cases would be more likely to be appealed as a result of the proposed law. Justice Boren writes, at Exhibit pp. 11-12:

> [The] CLRC claim that the "elimination of superior court review would not add to the workload of the court of appeal [but] would simply eliminate an unnecessary step" may possibly be correct as far [as] it goes. On the other hand, it is likely that the elimination of this step — the loss of one bite of the apple — will ultimately result in an increase of filings in the Court of Appeal with a concomitant increase in the number of writs that do not have summary dispositions.

It does seem likely that some cases will be resolved in the trial court as a consequence of having a second bite at the apple. Under the proposed law, those cases might instead be appealed. The magnitude of this shift in workload again depends on whether magistrate decisions in preliminary examinations are unusually unreliable. If so, then there will be a larger number of issues that could perhaps have been resolved in the trial court. If not, then the number of appeals should not be affected much by the proposed law.

On a separate point, Justice Boren also notes that the "quality of appellate review may in fact diminish because the pleadings will no longer have been refined by a layer of superior court review." Exhibit at p. 12. That is probably correct.

Prosecutorial Advantage

Under existing law, if a complaint is dismissed by a magistrate, the prosecutor can move for reinstatement under Section 871.5. If the reviewing judge declines to reinstate the complaint, the prosecutor can refile the complaint, so long as it is the first time that the complaint has been dismissed. A complaint that has been dismissed *twice* before cannot be refiled (unless one of a small set of exceptions applies). See Penal Code § 1387. This means that the prosecutor effectively has three bites at the apple: (1) argue against dismissal, (2) move for reinstatement, (3) refile.

Under the proposed law, both sides will lose their second bite — review of the magistrate's decision by a judge of the superior court. However, the prosecutor will still have the option of refiling. This slight advantage to the prosecution would not be created by the proposed law. It already exists. However, it is possible that elimination of superior court review of a magistrate decision could increase the importance of the prosecutor's advantage (because magistrate errors would have a greater effect on defendants, who must live with the result or appeal, than on prosecutors who are free to refile a dismissed complaint). That may be what Mr. Koury is suggesting, at Exhibit p. 2:

> As a 13 year criminal defense attorney, I have seen hundreds of scenarios where a court dismisses or reduces charges following the preliminary hearing and the prosecutor simply refiles the dismissed charges anyway, as if the preliminary hearing process had never taken place.
>
> The only mechanism to … get obviously [overfiled] charges dismissed and their prejudicial impact away from jurors is through a PC 995 motion. To remove the opportunity to have a review process will lead to vesting significantly more power in the prosecutor at the expense of judiciary.

Note that the San Diego District Attorney's office is opposed to the proposed law. This suggests that any prosecutorial advantage conferred by the proposed law is slight or is outweighed by some perceived disadvantage.

CONCLUSION

The purpose of the proposed law is to eliminate a specific form of superior court peer review that resulted from unification of the trial courts. The Commission had tentatively concluded that the review was needlessly duplicative and could result in an appearance of impropriety or actual bias. Both

of those conclusions are disputed in the comments we received in response to the tentative recommendation.

The staff is convinced that peer review can create problems. Human nature is such that it can be difficult to objectively review the work of close colleagues, especially if the roles of reviewed and reviewer might be reversed in the future. That difficulty is not insurmountable, but it is preferable that it be avoided if practical to do so (as academia has done with its anonymous reviews). Even if the risk of actual bias is manageable, it is also important that an appearance of bias be avoided.

It may be that in the narrow context addressed by the proposed law, peer review is not a serious problem. Some litigants may have doubts about the quality of their second bite at the apple, but most will probably want the bite anyway. If the commentators are correct that there is no significant peer review problem, then part of the rationale for the proposed law is negated. This would not necessarily mean that the proposed law should be abandoned, but it would substantially undermine the rationale.

Commentators also dispute the contention that the proposed law would increase procedural efficiency. The staff is persuaded that the proposed law would be less efficient than existing law *if* the magistrate decisions at issue are significantly less reliable than other decisions of a superior court judge. The commentators provide plausible reasons why this might be so.

At best, the proposed law would achieve a modest increase in procedural efficiency and eliminate a small part of any problems resulting from peer review in the superior court. If commentators are correct in disputing the assumptions underlying the proposed law, the proposed law could actually decrease procedural efficiency with little or no offsetting benefit.

Despite initial expressions of support for the concepts implemented in the proposed law — from the Attorney General's office and the Criminal Law Advisory Committee of the Judicial Council — comments on the tentative recommendation itself were uniformly negative. Those comments came from all sides of criminal law practice.

The staff does not see how the proposed law could be adjusted to address the concerns expressed in the comments. There may be ways to reduce the cost and delay associated with appeal of a magistrate's decision, or to reduce any peer review risks involved in superior court review of a magistrate's decisions, but such solutions are not obvious and none have been suggested.

Unless new information is presented in support of the proposed law, the staff is inclined to set it aside. Another alternative would be to defer a final decision until the Judicial Council survey of attorney perceptions of peer review in the superior court is available for analysis.

Respectfully submitted,

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Re: Proposed Amendments to Penal Code sections 871.5, 871.6, 995, 996, 1238.

I have reviewed the Commission's tentative recommendation of November, 2002, to amend the above-referenced Penal Code sections and strongly feel that the Commission's action is premature.

Having practiced criminal defense for over thirty-five years, it seems to me that although theoretically sound, the proposed amendments overlook the reality of daily practice.

In theory, Professor Uelmen is correct that "there is no reason to assume that the superior court judge presiding as magistrate at the preliminary hearing is any less thoughtful or reflective" than another judge of the same court. In practice, however, it is clear that judges with little or no criminal experience in felony matters are assigned to handle preliminary hearings. Indeed, the legislative fiat of unification has not transformed these magistrates into more experienced trial judges.

Additionally, the Commission's statement (3:9-11) that elimination of superior court review would not add to the workload of the appellate courts is optimistic at best. The Commission also ignores the effect of the proposed change on the caseload of the trial court. Faced with an erroneous ruling by an inexperienced magistrate, defense counsel will either proceed to trial, having no alternative in the trial court, or seek review in the appellate court.

Until such time as the judges assigned as magistrates are actually as "thoughtful or reflective in ruling" as their more experienced counterparts, the limited protection afforded to both defendants and the prosecution by these existing statutes should not be eroded.

Very truly yours,

Mark E. Overland

MEO:hs

Date: Fri, 14 Feb 2003
From: Koury Joel <jckoury@co.la.ca.us>
To: bherbert@clrc.ca.gov
Subject: pending legislation to delete PC 995 review

As a 13 year criminal defense attorney, I have seen hundreds of scenarios where a court dismisses or reduces charges following the preliminary hearing and the prosecutor simply refiles the dismissed charges anyway, as if the preliminary hearing process had never taken place.

The only mechanism to avoid get obviously overfiled charges dismissed and their prejudicial impact away from jurors is through a PC 995 motion. To remove the opportunity to have a review process will lead to vesting significantly more power in the prosecutor at the expense of judiciary.

For these reasons, I would urge you to reconsider any proposal that limits PC 995 review.

Sincerely,
Joel C. Koury
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February 14, 2003

California Law Revision Commission
4000 Middlefield Rd., Room D-1
Palo Alto, CA 94303-4739

Re.: Recommendation to do away with review of Magistrates Rulings.

Gentlepersons,

You delude yourselves under the guise of "inefficiency and the appearance of impropriety" excuses.

In all the years I have practiced a review of a magistrate (formerly a municipal court judge) by a superior court judge (usually the magistrate's colleague any how) was rarely successful.

The classic excuse was, "I can't find that the magistrate did not . . ." or "could not find . . ." a substantial basis of suspicion to rubber stamp the findings.

The only times these motions were generally granted was when the prosecutor led the reviewing judge into believing the prosecution did not want to or could not proceed to trial.

At least, reading it (the transcript of the preliminary hearing) on a 995 Motion gave the judge an insight into the weakness of the prosecution's case and led to many induced case settlements.

The appeal to the Court of Appeal, coming so late in the life of the case, is inadequate to resolve many cases. It is really a feigned cure for the recommendation.

Just encourage the reviewer to stick to the burden of a "strong suspicion" instead of any evidence and your reviews will not be inefficient.

You will never erase the potential for the appearance of impropriety so long as judges feel like brethren in the same fraternity.

Make the reviewing judge more qualified and the appearance of impropriety will be diminished—but it will never go away.

In conclusion, improve the procedure; don't toss it out just because consolidation has occurred. Your concern for the folly of a one-tier peer review system can be alleviated if the reviewing judge truly understands that they are making an independent and professional call, not a personal attached on a long-time colleague.

Very truly yours,

JOE INGBER

c.c.: Dean Gerry Uelman, Santa Clara University, School of Law

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BONNIE M. DUMANIS
DISTRICT ATTORNEY

February 24, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Commission:

On behalf of the San Diego County District Attorney, I offer these comments on your tentative recommendation proposing amendments to Penal Code sections 871.5, 871.6, 995, 996, and 1238, in light of trial court consolidation.

I have been a deputy district attorney for more than 30 years. I am the assistant chief of our Appellate and Training Division and have been the acting chief for the past month. The majority of my career has been spent litigating pretrial motions, and writs and appeals in the appellate courts.

In sum, I oppose the suggested changes. I believe that Penal Code sections 871.5 and 995 provide speedy, efficient, and effective review of magisterial decisions and should be retained in their present form. As a prosecutor, I naturally am more interested in retaining existing section 871.5, but the two provisions are complimentary.

Your proposal is based on the misperception that peer review creates an appearance of impropriety and is inefficient. Both notions are incorrect in my opinion.

First, you have undue concern about peer review. There is nothing inherently wrong with peer review. In medicine and science peer review is the accepted norm. Peer review pervades the judicial system and will continue to do so.

The proposed amendments do not eliminate peer review from the superior court. One superior court judge will still review the actions of another superior court judge on questions of probable cause and lawful commitment under section 995, in renewed motions to suppress evidence under section 1538.5, subdivision (i), in every motion attacking the validity of a search warrant issued by a magistrate, and

with numerous non-binding common-law motions. Peer review will continue to occur when the appellate department of superior court decides misdemeanor appeals and when the superior court considers petitions for extraordinary relief arising from misdemeanor cases.

A peer review process regularly occurs in our Courts of Appeal and Supreme Court. In the Court of Appeal, for example, three justices of equal status decide issues by agreeing or disagreeing on its resolution. In this process they may accept or reject relevant published opinions from other districts or divisions of the court or from other panels in the same district and division. They do this while maintaining collegiality and without a hint of impropriety.

Second, in my view the existing statutes enhance rather than degrade judicial efficiency. Both sections 871.5 and 995 provide a low-cost, speedy, and efficient means of identifying and correcting judicial error during the normal course of ongoing felony prosecution.

Section 871.5 provides a speedier remedy than review by the Court of Appeal. Resolution of an 871.5 motion takes weeks or months as opposed to years for an appeal. And while the motion is pending, the case continues to wend towards trial. But an appeal deprives the superior court of jurisdiction and thus halts trial proceedings until the appeal is resolved. Full briefing in the Court of Appeal commonly takes more than 90 days, and that is after the record is prepared and certified. Next a case is calendared for oral argument and then decided within 90 days of being submitted after argument. Finally, 60 days must pass after an opinion is filed before the case is remitted back to the superior court. A petition for writ of mandate or prohibition is not much speedier and has the added disadvantage to the parties of being heard only at the court's discretion.

Your proposal will shift the cost of review from the superior court to the Court of Appeal and will likely increases the cost. Most 871.5 motion issues never reach the Court of Appeal. A filtering process occurs as a criminal case progressed from complaint, to information, and to resolution. Many of the issues arising early in the prosecution go away over time. Thus, not every section 871.5 order is reviewed by an appellate court. Curtailing the section 871.5 motion process will increase Court of Appeal workload by increasing the number of 871.5 issues that court must resolve. And each 871.5 issue on appeal will be considered by three justices who must decide the issue by a written opinion rather than by a single judge who can decide the motion orally.

Finally, it has been my experience that section 871.5 motions are often better briefed and argued than the original motion. By then both parties have had more time to consider and reflect upon their respective positions. While the magistrate may be as reflective and thoughtful as an 871.5 judge, the latter will also have had more time to consider the issue. This is especially so with section 1385 motions which, before a magistrate, typically are oral rather than written and decided summarily.

Respectfully submitted,

BONNIE M. DUMANIS
District Attorney

By:

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Deputy District Attorney

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March 10, 2003

David Huebner
Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: California Law Revision Tentative Recommendation (dated November 2002: Criminal Procedure Under Trial Court Unification)

Dear Honorable Chairperson:

I am chairperson of the Appellate Courts Committee of the California Judges Association (CJA) and authorized to comment on the California Law Revision Commission's (CLRC) Tentative Recommendation concerning review of the magistrates' decisions in felony preliminary examinations. After reviewing the proposal, our committee is opposed to it because we conclude that (1) the perceived peer review problem is not significant and the perception is an unreasonable one, (2) the proposal would create delay and procedural inefficiency, and (3) the proposal would impede the settlement of criminal cases.

This CLRC recommendation, if followed, would eliminate superior court review of magistrates' decisions on motions to dismiss and on demurrers. (See CLRC's proposed amendments to Penal Code §871.5, §871.6, §995, and §1238.) Under the proposed statutory amendments, magistrates' decisions on such motions would be reviewed solely and initially by the Court of Appeal. (These provisions deal with setting the time for preliminary examinations, postponing those proceedings, sustaining demurrers, barring further criminal proceedings, dismissing in the furtherance of justice, and determining certain prior convictions.) Magistrates' decisions on probable cause would remain subject to superior court review.

CLRC justifies this recommendation by its conclusions that "The Problem" is that "Peer Review [is] Inefficient" and that peer review creates a "Perceived Impropriety." CLRC also concludes that, by eliminating superior court review of a magistrate's decisions on motions to dismiss and demurrers and resting such review solely with the appellate courts, the proposed law revision provides "[t]he best method for correcting [magisterial] errors." CLRC asserts that "court of appeal justices specialize in identifying trial court errors . . . . [and] have no collegial interest in affirming a magistrate's decision that might create an appearance of impropriety." CLRC concludes that "elimination of superior court review would not add to the workload of the court of appeal. It would simply eliminate an unnecessary step."

The proposed revision leaves review of a magistrate's probable cause determination with the superior court, concluding that such review "is an efficient process that works well" and "leads to better result," based apparently on the assumption that "[u]nlike a noticed motion or demurrer, a probable cause determination is often made in an expedited manner, with less thorough preparation by counsel and less time for deliberation."

We have serious concerns that the perception of impropriety and the prospect of process improvement are significantly exaggerated, that CLRC's proposal will not have any serious effect upon any such perception, and that the proposal will not solve any problem of inefficiency but rather create inefficiency, additional cost, and delay. Moreover, that delay will also impede to a substantial degree pretrial case settlement.

Please consider the following:

1. **Peer Review.**

The CLRC proposal is premised in part on the assertion that the current two-tiered review procedure creates a "Perceived Impropriety." While perceptions exist that peer review within the superior courts is improper, such perceptions are not significant except in an academic sense. More importantly, they are unreasonable as to review respecting Penal Code section 995. The present process gives litigants two bites of the apple in the trial court and still allows appellate review. We believe that litigants and counsel would much rather have the two bites than eliminate one of the bites for the mere sake of erasing a perception in a narrow area or a claimed inefficiency. We also note that, even after unification, trial court judges often wear multiple hats in a variety of situations. With respect to 995 motions, superior court judges have, for the most part, always reviewed the decisions of other judges with whom they were acquainted. The cited perception ignores the pride and independence most trial judges display in making such decisions and operating their individual courtrooms. It also ignores or discounts the comments, oral and written, that proponents of trial court unification made

during that election campaign to persuade voters to amend the constitution to unify the trial courts. That campaign asserted that public costs would be reduced and court efficiency improved. The CLRC proposal will do neither.

A cursory review of California trial court procedure illustrates that peer review (i.e., a superior court judge revisiting an issue previously determined by another superior court judge) occurs regularly and without suggestion of impropriety. Here are a few examples:

a. A CCP §438(g) judgment on the pleadings may follow a prior decision overruling a demurrer.

b. CCP §170.3 motions to disqualify (in which the Chief Justice frequently assigns a judge from another county) are not technically decided in the same court but the reviewing judge has the same jurisdictional power and the practical effect is that the reviewing judge determines whether the challenged judge is disqualified. (If the challenged judge thought he or she was disqualified, the judge would have accepted the challenge. The issue of deference to a colleague is similar.)

c. Under CCP §170.3(b)(4) when a judge disqualifies him/herself after having made rulings in a case, and the disqualification is based on matters learned after those rulings, the successor judge may for good cause set aside the rulings that the disqualified judge made previously.

d. Generally, if a different judge tries a case after remand following an appeal, that judge is not bound by the first judge's rulings. In fact, CCP §170.1 permits an appellate court to direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court. Generally, pretrial rulings such as motions in limine made by one judge, are not binding on a successor judge if for some reason the first judge does not try the case (reallocation of the court's workload, change of assignment, incapacity, retirement, death, etc.). (See 2 Witkin, California Procedure (4th ed. 1997) Courts § 237. But see *In re Alberto* (2002) 102 Cal.App.4th 421 [second judge may not review bail decision of first judge].)

e. Penal Code §1538.5 also presents a number of peer review situations. Subdivisions (h), (i) and (j) control trial court review after search and seizure decisions by the magistrate during a preliminary examination.

The area of review addressed by this proposal is a narrow one, which, to our knowledge, has not been subjected to significant controversy, study, or scrutiny. This marked change in the criminal pretrial appellate pattern review of magistrates' decisions may appear innocuous, but it is fraught with potential

difficulties and is highly likely to be loaded with hidden but significant unintended consequences. We will denote a few of these potential problems.

2. **Cost, Delay, & Inefficiency.**

The proposal would provide for direct writ review by the Court of Appeal of decisions based on procedural and continuance factors, but not for probable cause determinations. The latter would continue to be reviewed by superior court judges. The CLRC recommendation claims that the present process is "[i]nefficient" and that the proposal will "eliminate an unnecessary step" and provide the "best method."

As we have stated above, we doubt that litigants and counsel who presently benefit from the "two-tiered" system will find any significant virtue in the claimed efficiency. Nor, as we have stated, will the CLRC proposal eliminate any real perception of impropriety. Rather, the change will be seen as one of loss and one that eliminates a level of due process protection. The pleadings and supporting documents that will be filed at the Court of Appeal level will also be less refined and in some ways more costly.

The Judicial Council's *2002 Annual Report* presents statewide court statistics concerning "Felony Results At or Before Preliminary Hearing." (See *Superior Courts*, Table 9 for fiscal year 2000-2001.) The report shows that there were 226,334 cases in which there were "bindovers, certified pleas and dismissals at or before preliminary hearing." Of those, 173,733 cases resulted in the accused being held to answer or entering a felony guilty plea. The report shows that 179,729 cases achieved disposition before trial. (See *Superior Courts*, Table 8 for fiscal year 2000-2001.) The report also shows that the Court of Appeal had 4,741 criminal law writ filings in fiscal year 2000-2001, and written opinions in writ proceedings in all three categories (civil, criminal, and juvenile) totaled only 847. (See *Court of Appeal*, Tables 4 and 5.)

It cannot be ascertained from this data how many 995 motions were filed or what proportion of those motions were based on Penal Code section 859(b) factors or continuances without good cause, on the one hand, and lack of probable cause, on the other. Neither can it be determined from this data how many writ proceedings, appeals, or written opinions currently flow from determinations made pursuant to Penal Code section 871.5, 871.6, or 1238.

Our experience is that the vast majority of 995 motions -- perhaps 90% -- are based on claims of lack of probable cause. Thus, the CLRC claim that the "elimination of superior court review would not add to the workload of the court of appeal [but] would simply eliminate an unnecessary step" may possibly be correct as far it goes. On the other hand, it is likely that the elimination of this step -- the loss of one bite of the apple -- will ultimately result in an increase of filings

in the Court of Appeal with a concomitant increase in the number of writs that do not have summary dispositions.

Most likely, the CLRC proposal will place additional costs on criminal litigation both in the trial court and in the Court of Appeal. It will also substantially lengthen trial court proceedings in those cases that are reviewed by the Court of Appeal. The quality of appellate review may in fact diminish because the pleadings will no longer have been refined by a layer of superior court review.

Current review within the superior court by writ pursuant to section 871.6 is generally expeditious. If section 871.6 is amended as proposed, the potential is for a minimum of a 33-day delay when a peremptory writ issues. This is due to the fact that Court of Appeal decisions are not final for 30 days and the remittitur issues 3 days thereafter. Additional delay will occur in cases where the Court of Appeal requests opposition. Meanwhile, trial court proceedings will be halted, and the accused will often be in custody. It is difficult to understand how this change in process benefits either the defense or the prosecution with respect to delay and timing issues.

More significantly, these delays will undoubtedly generate additional costs to the judiciary and to the parties. These costs will arise from the additional administrative tasks that will be required, the additional materials that the parties will produce, the costs of transmission of materials, and simply having a case take longer.

3. <u>Impedence of Case Settlement.</u>

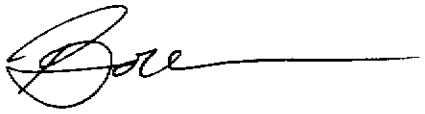
Under the CLRC proposal, when a case is challenged on procedural grounds (those presented in the Penal Code provisions enumerated in subdivision (a)(12) of section 1238 as proposed to be amended) and review in the Court of Appeal is undertaken, that case will come to a standstill in the trial court as jurisdiction will reside in the appellate court. More importantly, counsel for the parties will not come into direct contact with each other as they do when proceedings remain in the lower courts. Because they will not meet with each other and with the trial judge, a significant stage of case settlement will be eliminated or substantially delayed. Presently, cases that acquire procedural baggage often present an opportunity for open discussion of the general merits of the matter. Such discussions include an evaluation of the pros and cons of refiling the case. With or without the interaction of the trial judge, many such matters are settled at this stage. Direct review by the Court of Appeal bypasses this stage and will make such settlement much more difficult and probably less frequent.

CONCLUSION

If problems of inefficiency and peer review perception are the driving forces behind CLRC's recommendation, then it does not present a solution. The recommended proposal will deprive criminal court litigants of a beneficial level of review and increase delay and cost in the trial court. It will also impede settlement of cases because of the considerable periods of delay that will necessarily ensue.

Thank you for considering the comments of our CJA committee.

Very truly yours,



ROGER W. BOREN
Committee Chair

cc: CJA Executive Board
CJA Criminal Law Committee
All Administrative Presiding Justices & Presiding Justices of the California Court of Appeal (via e-mail)