Background Study

CALIFORNIA CRIMINAL PROCEDURE

AND

TRIAL COURT UNIFICATION.

Prepared for
California Law Revision Commission
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Introduction.

The purpose of this study is to provide the California Law Revision Commission with background and possible alternative approaches to modify criminal procedures in the wake of the unification of trial courts in California. The study will focus upon procedures that now permit a superior court judge to review rulings made by another superior court judge. No attempt will be made to address the problem created by the review of misdemeanor appeals by the appellate divisions of the superior courts. An exhaustive analysis of that problem was submitted to the Appellate Process Task Force of the Judicial Council by the Ad Hoc Task Force on the Appellate Divisions in May, 2001, and the author of this background study fully concurs in the proposals contained in their report, as well as the tentative recommendation of the Law Revision Commission to implement those proposals by creating divisions of limited jurisdiction in the Courts of Appeal.[1] Some special problems created by writs in criminal cases not within the jurisdiction of the appellate divisions, which were not addressed

[1] The administrative advantages of creating new divisions in the Courts of Appeal are noted in Tentative Recommendation #J-1310 of the California Law Revision Commission, "Appellate and Writ Review Under Trial Court Unification," November, 2001. Another advantage is consistency. The Ad Hoc Task Force proposed a unique appellate structure for Los Angeles County which differed from the appellate divisions proposed for the rest of the state. While the problems presented by peer review are less serious in Los Angeles County, where many of the Superior Court judges have never even met each other, the problem of appearances remains. While the Law Revision Commission's tentative recommendation does not foreclose Judges of the Los Angeles County Superior Court from sitting on assignment to the limited jurisdiction division of the Second District Court of Appeal, and hearing appeals from the Los Angeles County Superior Court, their assignment to the Court of Appeal has a cosmetic advantage not offered by the proposal of the Ad Hoc Task Force.

in the Commission's tentative recommendation, will be addressed in this study, however.

This study will briefly address the impact of trial court unification in California, describe the criminal procedures that are affected by unification, discuss the arguments that might support a change, compare the experience of other jurisdictions that have unified their trial courts, and then offer recommendations for change.

In the course of preparing this study, the author met on two occasions with the Criminal Law Advisory Committee of the Judicial Council of California. Although the Committee found much to disagree with, the meetings were invaluable in shaping and honing the recommendations contained herein. There does not appear to be widespread agreement among the California judiciary, however, that peer review is a serious systemic problem requiring structural changes in the criminal justice system.

The Two-Tier System

The unification of trial courts in California poses a peculiar challenge in the processing of felony criminal cases. Previously, felony cases were processed through a two-tier system. A complaint was filed in the Municipal Court, where a preliminary hearing was conducted by a magistrate. Although judges of any court were authorized to sit as

magistrates,[2] prior to unification the magistrate was invariably a municipal court judge. If the magistrate made a finding of probable cause, the prosecutor could file an information in the superior court.[3] Pursuant to a motion under Penal Code § 995 (a) (2) (B), the defendant could challenge the magistrate's probable cause finding in the superior court. A superior court judge would then review the preliminary hearing transcript and make a *de novo* determination of probable cause. If the magistrate rejected a finding of probable cause and dismissed the complaint, the prosecutor had two options. He could refile the complaint pursuant to Penal Code § 1387 and start over,[4] or he could make a motion to reinstate the complaint in the superior court, pursuant to Penal Code § 871.5. Thus, superior court judges were regularly called upon to review probable cause findings by the municipal court judges sitting as magistrates.

The same option for superior court review was available to prosecutors if the complaint was dismissed because the preliminary hearing

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[2] Penal Code § 808.

[3] The prosecutor had, and continues to have, an option to seek indictment by a grand jury. The indictment is filed directly in superior court, where the finding of probable cause can be challenged pursuant to motion under Penal Code § 995 (a) (1).

[4] This option was only available once. If the case was previously dismissed, a second dismissal was a bar to subsequent prosecution unless the prosecution could show substantial new evidence which would not have been previously known through due diligence, or the prior dismissal was due to witness intimidation or failure of the complaining witness to respond to subpoena in a case of spousal abuse. Penal Code § 1387 (a).

was not conducted within requisite time limits,[5] the preliminary hearing was not completed at one session,[6] the magistrate granted a demurrer,[7] the defendant was serving another sentence and his request to be brought to trial within 90 days was not honored,[8] the magistrate made findings that dismissal was required in the furtherance of justice,[9] the prosecution was barred by prior dismissals,[10] or a detainer had been issued against a prisoner in another state on the basis of the complaint, the prisoner demanded final disposition, and the procedures mandated by the interstate agreement on detainers had been violated.[11] If the magistrate denied a motion to dismiss based on any of these grounds, the defendant could contend that he was not legally committed by a magistrate, and move to set aside the information pursuant to Penal Code § 995 (a) (2) (A). A more likely remedy, however, would be a new demurrer directly to the information rather than the complaint, if it contained the same defect, or a motion to dismiss the information pursuant to Penal Code §§ 1385, 1387 or 1388. These sections

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[5] Pursuant to Penal Code § 859b the preliminary hearing must be conducted within ten days if the defendant is in custody, or sixty days if the defendant is not in custody.

[6] Penal Code § 861.

[7] Pursuant to Penal Code § 1004, a defendant may demur to the complaint if it appears on the face thereof:

1. that the court has no jurisdiction of the offense charged;
2. that the complaint does not conform to requirements as to form contained in Penal Code §§ 950, 952;
3. that more than one offense is charged except as permitted by Penal Code § 954;
4. that the facts stated do not constitute a public offense;
5. that the complaint contains matter which, if true, would be a defense or bar to prosecution.

[8] Penal Code § 1381 (State custody); Penal Code § 1381.5 (Federal custody).

[9] Penal Code § 1385.

[10] Penal Code § 1387.

[11] Penal Code § 1388.

authorize the dismissal of a complaint or an information, so it made more sense to directly invoke the discretion of the superior court judge presiding over the information than to challenge the legality of the commitment by the magistrate pursuant to Penal Code § 995.

The defendant also had an option to move to suppress evidence at the preliminary hearing, pursuant to Penal Code § 1538.5 (f). If the motion was granted by the magistrate and the complaint was dismissed, the prosecutor could refile or move the superior court to reinstate the complaint pursuant to Penal Code §871.5.[12] If the motion was granted by the magistrate and the defendant was held to answer on the basis of other evidence, the prosecutor could relitigate the motion *de novo* at a special hearing in the superior court.[13] If the motion was denied by the magistrate and the defendant was held to answer, the defendant could renew the motion in the superior court, although he was limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing.[14]

If a magistrate set a preliminary hearing beyond the time limits specified in Penal Code § 859b[15] or continued the hearing without good

[12] Penal Code § 1538.5 (j).
[13] *Id.*
[14] Penal Code § 1538.5 (i).
[15] See n. 4, *supra*.

cause, either the prosecution or the defendant could seek a writ of mandate or prohibition in the superior court.[16]

The Impact of Unification.

Trial court unification, which eliminates the municipal court and elevates municipal court judges to the superior court, has now been achieved in every county in California.[17] The purpose of this reform was to achieve greater efficiency in the assignment and utilization of judicial resources. To a great extent, this purpose has been achieved.[18] But the elimination of the "two-tier" system has produced some anomalies. While the judicial officer presiding over the preliminary hearing is still a "magistrate," the magistrate is invariably a judge of the superior court. All of the procedural devices for review and relitigation of magistrate's determinations remain in full force and effect. But now, these devices engage superior court judges in reviewing the rulings and determinations of fellow superior court judges, rather than judges of an "inferior court."

The review of legal rulings of one superior court judge by another judge of the same court raises troublesome questions relating to the

[16] Penal Code § 871.6.
[17] Proposition 220, the 1998 initiative which authorized court consolidation, provided that municipal and superior courts could be unified upon majority vote of both the municipal and superior court judges within the county. Calif. Const., Art. VI, sec. 5 (e).
[18] American Institutes for Research, **Analysis of Trial Court Unification in California, Final Report,** submitted to Judicial Council of California, Sept. 28, 2000.

appearance of propriety, the risk of bias, and the impairment of collegiality. These "peer review" issues will be analyzed in greater detail below. A separate issue relates to judicial efficiency and economy, the underlying purpose of court unification. Having two judges of equal rank on the same court hear and decide the same issue twice is certainly duplicative. Whether that duplication can be justified in the interest of fairness or to promote other values will also be analyzed in greater detail below.

The issues of peer review and judicial efficiency will be addressed in the context of two basic questions:

(1) **Should the separate designation of "magistrates" be abolished?**

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.[19] One superior court judge may not reconsider and overrule a ruling of another superior court judge in the same case. Penal Code sections 995 (a) (2), 871.5, 871.6, and portions of 1538.5 would be repealed. Preserving the designation of judges as magistrates, however, could serve as a convenient fiction to maintain the *status quo*. Superior court judges could continue to review the rulings of

[19] *See Silverman v. Superior Court* (1988) 203 Cal.App.3d 145, 150-51; *People v. Madrigal* (1995) 37 Cal.App.4th 791; *Ford v. Superior Court* (1986) 188 Cal.App.l3d 737; *In re Kowalski* (1971) 21 Cal.App3d 67.

magistrates, because the ruling being reviewed is *not* the ruling of another superior court judge. When sitting as a magistrate, the judge is no longer sitting as a judge of the superior court, even though the reason he is eligible to sit as a magistrate is because he or she is a judge of the superior court.

(2) **Should we pick and choose among the functions assigned to magistrates, selecting which rulings may be reviewed by superior court judges, and which may not?** If there are practical reasons which justify review of some rulings, we should permit only those rulings to be reviewed. Broad categories of rulings can be identified by statute to permit review. A variation of this alternative could simply deprive magistrates of jurisdiction to make some rulings. The superior court judge sitting as magistrate could continue to make these rulings, but in doing so he or she would be acting as a superior court judge, not as a magistrate. The ruling would thus be insulated from review by another superior court judge. For example, the determination of probable cause by a magistrate could continue to be reviewed on a Section 995 motion, but statutory amendments could require all demurrers and dismissal motions to be heard and decided by a superior court judge.

The Abolition of Magistrates.

A Background Memorandum previously prepared for the California Law Revision Commission concluded:

> "If courts in all counties unify, it is doubtful whether any useful purpose would be served by retaining the separate designation of 'magistrates.' The term was convenient when there were multiple trial courts since it permitted preliminary hearings and certain other routine criminal justice functions (e.g., warrants, bail, and arraignments) to be performed by judges from so-called 'inferior' courts who were designated as magistrates. If all courts unify, however, there will be no 'inferior' courts, and those functions will necessarily be performed by superior court judges acting in their role as magistrates. The entirely symbolic and seamless changing of roles between magistrate and superior court judge will serve no useful purpose.
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> In a fully unified state, the term 'magistrate' can continue to have significant value only to the extent that someone other than superior court judges can exercise the power of a magistrate. Under limited circumstances under current law, some commissioners are authorized to exercise some magistrate

> power. The question for consideration is whether all commissioners should be given general authority to act as magistrates. If this were done, the term 'magistrate' would retain meaning and utility since it would permit commissioners to exercise a well-defined but limited role in criminal justice proceedings."[20]

With all due respect, no compelling reason appears to bundle the issue of the continuing designation of 'magistrates' together with the issue of the appropriate role of commissioners. Even if 'magistrates' are abolished, Commissioners could be empowered to conduct preliminary hearings or rule on particular motions by amending Section 259 of the Code of Civil Procedure to expand their authority. There is no need to continue the role of magistrates simply in order to accommodate a more expansive use of commissioners. It might be suggested that the current delineation of the magistrate's role permits the review of magistrate's rulings by superior court judges, and that this reviewability is needed if commissioners are serving as magistrates. But maintenance of the current delineation would permit review regardless of who served as the magistrate, even a superior court judge. A sounder approach might be to accompany an expanded definition

[20] Deborah Kiley & J.Clark Kelso, **Subordinate Judicial Officers and Magistrates, Background Memo,** California Law Revision Commission, p. 1 (Undated).

of the powers of commissioners with statutory authority for their rulings to be reviewable by superior court judges, without that reviewability depending upon their designation as magistrates.

Rather than focusing upon the status of the individual sitting as magistrate, it may be more helpful to focus upon the nature of the rulings made by the magistrate to determine if further review of the ruling within the superior court is desirable.

Especially in larger counties, 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.

The § 995 motion provides an opportunity for more careful analysis of the evidence available to support each element of the offenses charged. The judge can dramatically shorten anticipated trial time by dismissing some but not all counts of the information.

It might be suggested that abolishing the § 995 motion for informations would produce change, by motivating lawyers and judges to devote more preparation and deliberation to the preliminary hearing, knowing that the finding of probable cause could not be challenged again in the trial court. Such reallocation of resources might be counterproductive, however. Many cases plead out after the preliminary hearing, without a § 995 motion ever being filed. To devote more judicial resources, as well as the limited resources of district attorney and public defender offices, to more intensive preparation and consideration of preliminary hearings may spread those resources over a broad array of cases where they are unnecessary to a final disposition. The § 995 motion allocates more intensive preparation to the smaller number of cases that are still on track for trial. For many defendants, even a perfunctory preliminary hearing serves as reality therapy, convincing them that the prosecution has a convincing case that will ultimately persuade a jury to convict.

In any event, it is highly unlikely that repeal of § 995 (a) (2) (B) would itself dramatically change the way preliminary hearings are conducted without a major reorganization of public defender and district attorney offices. Unless the lawyers conducting the preliminary hearing will be the lawyers trying the case, they will lack the motivation to devote extensive

preparation to the preliminary hearing. Even if they did, this might be duplicative of trial preparation, again a misallocation of scarce resources.

More extensive preparation and consideration of preliminary hearings could also inject greater delay into the system at a stage where longer delays cause immeasurable harm. A prompt preliminary hearing often expedites the disposition of a case, providing an opportunity for the public defender to gain the confidence of his or her client as a zealous advocate. Longer delays may also mean more time in custody for more defendants. If the § 995 motion were limited to indictments, lawyers would need more time to research and argue the legal issues, and seek more continuances of the preliminary hearing. Judges would also need more time, and more judicial resources would have to be allocated to the preliminary hearing calendars.

The negative consequences of superior court review of magistrate's probable cause rulings may be conjectural. Most magistrates are not even aware of later rulings on § 995 motions arising from preliminary hearings they have conducted. Even when they are aware, they are apt to attribute a reversal to the better preparation of the arguments subsequent to their rulings, although they will certainly attribute an affirmance to their own astute judgment. Thus, at least in large counties, the threat to collegiality and the risk of bias posed by peer review may be minimal. The appearance

of justice may be tainted, since the overwhelming proportion of peer reviews will result in an affirmance of the magistrate, and cynical defendants (and some lawyers) will attribute the result to cronyism. On the other hand, even a very small proportion of reversals will leave defendants better off than if there were no review at all, and public policy should not be driven by the disappointed murmurs of defendants and their lawyers.

Is it possible to pursue a different policy in a smaller county where peer review is more likely to create real problems? Half of California's fifty-eight counties have ten or fewer judicial positions, and twenty-one counties have fewer than six.[21] In these counties, the appearance of cronyism may be more pronounced, the risk of actual bias may be greater, and the threat to collegiality may be magnified. These risks led the Ad Hoc Task Force on the Superior Court Appellate Divisions to recommend that district-wide superior court appellate divisions be created, so superior court judges would no longer hear appeals from cases decided by their peers on the superior court of their county.[22] An exception is recommended for Los Angeles County, where all of the superior court judges sitting on the appellate division would be from the Los Angeles County Superior Court. If

[21] 2001 Court Statistics Report, Judicial Council of California, Table 1.
[22] Report to the Appellate Process Task Force on the Superior Court Appellate Divisions, May, 2001.

peer review is inappropriate for misdemeanor appeals in smaller counties, why should it be permitted for § 995 motions in felony cases?

Part of the answer may be the administrative morass that would be created if magistrate positions were abolished only in smaller counties, depriving defendants in those counties of any review in the superior court of rulings made at the preliminary hearing, while such review continued to be available in larger counties. The difference could not be justified by any difference in the quality of justice meted out at the preliminary hearing. An alternative might be to have § 995 motions heard by a superior court judge from another county, perhaps even by a judge of the newly created district-wide appellate divisions, if the recommendation of the Ad Hoc Task Force is implemented. But this overlooks the fundamental difference between an appeal from a final judgment and a § 995 motion. Inter-county transfers of cases would severely disrupt the efficient disposition of ongoing criminal prosecutions. A hard choice must be made, and the statewide practice should be determined by the greatest good for the greatest number. In the fiscal year 1999-2000, a total of 194,726 felony cases were disposed of in California. A grand total of 5,221, or 2.7% of the total, were disposed of in the twenty-one counties with fewer than six judges.

Picking and Choosing.

While the fair and efficient processing of felony cases may be furthered by continuing to designate the judges who preside over preliminary hearings as "magistrates," and allowing their probable cause determinations to be reviewed by fellow superior court judges pursuant to §995 and §871.5 motions, the same rationale may not justify reviews of determinations of motions to dismiss for reasons other than a lack of probable cause. Currently, §871.5 permits superior court review of a magistrate's dismissal "pursuant to Section 859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387 or 1389 or Section 41403 of the Vehicle Code." Dismissal for lack of probable cause is pursuant to Penal Code § 871. The grounds for dismissal pursuant to the other enumerated provisions, with the exception of Vehicle Code § 41403,[23] are explained at p.4, *supra*. Dismissal on these grounds would require a formal motion and opportunity to respond pursuant to superior court rules, and the magistrate would be required to make a formal ruling with an explanation of reasons.

If a motion to dismiss on these grounds is denied, the defendant may obtain a second hearing in the superior court either by challenging the legality of his commitment by the magistrate pursuant to § 995 (a) (2) (A), or by moving to dismiss the information on the same grounds.

[23] Vehicle Code § 41403 permits a pretrial challenge to the constitutionality of separate convictions to prevent their use in a subsequent trial.

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 §995 (a) (2) (B) and §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. This change could be achieved in either of two ways, both of which would require amendment of Penal Code § 995 to eliminate subsection (a)(1)(A) and of Penal Code § 871.5 to remove reference to all grounds for dismissal other than § 871. We could continue to permit these motions to be made at or before the preliminary hearing stage, but provide that the judge is not

sitting as a magistrate when he determines these motions. He is sitting as a superior court judge, and no other superior court judge could subsequently redetermine the same issue, even if it is asserted after the form of the pleading has been transformed from a complaint to an information.

The other alternative would be to prelude any motion to dismiss at the complaint stage except for lack of probable cause, and dismissal motions based upon improper delay or continuance of the preliminary hearing, a delay in the filing of the complaint, or the bar imposed by prior dismissals. These dismissal motions would be heard by the judge sitting as a superior court judge, rather than as a magistrate. A demurrer or dismissal motion based on other defects would only be heard after an information has been filed.

There would be two advantages to utilizing the second alternative. It would achieve symmetry between the treatment of grand jury indictments and informations. Motions to dismiss are not permitted during an ongoing grand jury investigation. Why should they be permitted prior to a determination of probable cause at a preliminary hearing? The principal difference, of course, is that the defendant may have been arrested on the complaint and may be in custody during the preliminary hearing, but his

constitutional right to challenge the probable cause for his confinement[24] is fully vindicated by the authority of the magistrate to dismiss for lack of probable cause. There is no constitutional right to immediate disposition of challenges asserting other defects in the prosecution. Limiting dismissal motions to informations or indictments would also prevent judge shopping, where counsel elects to file a motion at the preliminary hearing stage solely because he anticipates a more sympathetic ear from the judge assigned to the preliminary hearing calendar.

On the other hand, the nature of the defects which can be addressed by demurrer include jurisdictional defects. If the court lacks jurisdiction, the defendant should be permitted to assert that defect at any stage in the proceeding. Rather than precluding demurrers or substantive dismissal motions at the complaint stage, it should be left to the tactical judgment of counsel when and where to file these motions. Limiting counsel to one hearing of these motions in the Superior Court, however, may have a salutary effect. This is one small change in the "culture" of criminal practice which is readily achievable. Just because probable cause determinations are necessarily made the in the "down and dirty" turmoil of preliminary hearings with minimal thoughtful preparations by lawyers or judges, there is no

[24] *County of Riverside v. McLaughlin* (1991) 500 U.S. 44.

reason to treat demurrers and dismissal motions in the same way. A demurrer or a motion to dismiss should require a formal noticed motion and a reasoned ruling with due deliberation and preparation. If counsel cannot devote the resources necessary to this task at the complaint stage, then counsel should forego the motion until later in the proceedings. Precluding redetermination of these motions in the Superior Court may reduce the frequency with which these motions are made at the complaint stage, reserving them for full-scale presentation after the information is filed. That scenario may be preferable, however, to half-baked motions and rulings being revisited by another judge of the same court.

With respect to dismissal motions based upon a delay or continuance of the preliminary hearing, the need for an immediate remedy would justify permitting these motions at the preliminary hearing stage, but there is no reason why another superior court judge should be allowed to reconsider the rulings on such motions. A motion to dismiss based upon delay in initiating the prosecution or based upon the bar imposed by prior dismissals also justifies a motion to dismiss the complaint, but the ruling on those motions as well should be made by superior court judges not sitting as magistrates. If these motions are made at the complaint stage, they should not be reheard as

grounds to dismiss the information. The judge would be bound by the prior ruling of a superior court judge on the same issue.

Thus all dismissal motions would only be heard once in the superior court. This does not, of course, foreclose subsequent review of the ruling on the dismissal motion. Review would occur in the Courts of Appeal, pursuant to writ or appeal from final judgment.

The treatment of suppression motions made during the preliminary hearing presents greater complexity. Conventional wisdom has made suppression motions rare events at preliminary hearings, but the option remains available,[25] and the option does permit redetermination of a magistrate's ruling by a superior court judge. It would appear that when the option is pursued, it is with at least the same degree of deliberation and reflection by counsel and court that would accompany a motion to dismiss. On the other hand, the determination is so closely intertwined with the probable cause determination that considerations of judicial efficiency would hardly be furthered by separating these determinations, and requiring the superior court judge ruling on the § 995 motion to fully honor the

[25] The option was utilized to move for the suppression of evidence during the preliminary hearing in the case of *People v. O.J. Simpson*. The author of this report explained the tactical considerations that led to this decision in Uelmen, **Lessons From the Trial: The People v. O.J. Simpson,** (Kansas City, 1996), pp. 32-34.

magistrate's determination to admit or exclude evidence challenged on a suppression motion.

The Problem of Extraordinary Writs

With respect to extraordinary writs, peer review within the superior court is not entirely a problem created by trial court unification. Superior court judges have always had concurrent jurisdiction with the Courts of Appeal and the Supreme Court to issue a writ of habeas corpus, for example, and a writ of habeas corpus may challenge a prior ruling of a superior court judge. It is not a *direct* challenge, however. The writ really challenges the lawfulness of the petitioner's confinement, and may do so on the basis of evidence that was never previously presented to a judge of any court. The Courts of Appeal and the Supreme Court ordinarily deny a habeas petition which was not presented in the superior court in the first instance.[26] The prevailing practice in most superior courts is to assign a petition for a writ of habeas corpus to the *same* judge who rendered the judgment of conviction.[27]

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[26] *In re Hillery* (1962) 202 Cal.App.2d 293, 294; see Cal. Rules of Court, Rule 56 (a) (1).

[27] Penal Code § 859c now provides:

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

Although no court has yet addressed the issue, it does not appear that habeas corpus petitions would fall within this prohibition.

In the recent case of *In re Thomas Ramirez*,[28] the defendant filed a writ of habeas corpus challenging a misdemeanor sentence in the Court of Appeal, arguing that consideration of the writ by the superior court would constitute peer review in violation of the principle that one superior court judge cannot review issues decided by another judge of the same court. The contention was rejected, because the constitution directly conferred jurisdiction over habeas corpus petitions upon the superior court, and jurisdiction over habeas corpus petitions is fundamentally different than appellate jurisdiction. The court concluded that the petition should be filed in Department 70 of the Los Angeles County Superior Court, where it would be determined by a single judge of the Appellate Division. The order challenged in *Ramirez* had originally been made in Municipal Court prior to trial court unification in Los Angeles County, and the rule assigning Department 70 judges to hear habeas petitions only applied to misdemeanor cases. After unification, there is no longer any reason to distinguish misdemeanor from felony cases, and all writs of habeas corpus can be assigned to the trial judge who sentenced the defendant. If that judge denies relief, the petition will then be heard by the Court of Appeal.

[28] --- Cal.App.4th --- (2001).

With respect to writs in the nature of mandamus, certiorari and prohibition, the situation is more complex. The constitutional amendment authorizing court unification provides:

> "The Supreme Court, courts of appeal, superior courts and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction."[29]

With regard to these writs, a distinction between misdemeanor and felony cases is apparently contemplated, with the appellate divisions handling misdemeanors, but felony cases assignable to any judge of the superior court, including, possibly, the judge whose order is being challenged.[30] This could raise substantial peer review issues. Consider, for example, Penal Code § 871.6, which provides:

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[29] California Constitution, Art. VI, section 10.

[30] Again, no court has addressed the question, but a much stronger argument could be made that these writs come within the prohibition of same judge review in Penal Code §859c, since an order of the judge is being directly reviewed. On the other hand, the review may not be "provided for" under provisions of the Penal Code. In the case of Penal Code § 871.6, however, it clearly is.

> "If in a felony case the magistrate sets the preliminary examination beyond the time specified in Section 859b, in violation of Section 859b, or continues the preliminary hearing without good cause and good cause is required by law for such a continuance, the people or the defendant may file a petition for writ of mandate or prohibition in the superior court seeking immediate appellate review of the ruling setting the hearing or granting the continuance."

The writs contemplated by Penal Code § 871.6 would not come within the grant of original jurisdiction to the Appellate Division of the Superior Court. On the other hand, they should not be treated the same as habeas corpus petitions, since they do involve direct appellate review of the ruling of a superior court judge sitting as a magistrate. Section 871.6 writs were not addressed in the tentative recommendation of the Law Revision Commission.[31] Serious consideration should be given to transferring jurisdiction over Penal Code § 871.6 writs to the Courts of Appeal.

The Experience of Other Jurisdictions

In 1971, the National Conference on the Judiciary of the American Bar Association adopted a consensus statement providing:

[31] See fn. 1, *supra.*

> "There should be only one level of trial court, divided into districts of manageable size. It should possess general jurisdiction, but be organized into specialized departments for the handling of particular kinds of litigation."[32]

A number of states set out to unify their trial courts in the wake of this recommendation, with mixed results. Some states set up one trial court, but with two or three levels of judges.[33] Others have a single trial court whose jurisdiction does not include municipal ordinances.[34] The varieties of "unification" make the experiences of other states of limited value in resolving the issues addressed in this study. While other states struggled over the role of "magistrates," it appears the California provisions for review of probable cause determinations pursuant to Penal Code § 995 are truly unique. A review of the experience of other jurisdictions did produce one useful insight, however. The discomfort with peer review has never achieved constitutional stature, or even recognition of any inherent judicial authority to override a legislative judgment. In *Zahn v. Graf*,[35] for example, a trial judge dismissed a post-unification appeal of a speeding charge, on the

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[32] National Conference on the Judiciary, Consensus Statement (1971).
[33] For example, Illinois and Oklahoma have judges and associate judges, Idaho has judges and magistrates, Kansas has judges, associate judges and magistrates, and South Dakota has circuit judges, law-trained magistrates, and lay magistrates. "State Court System Unification," American University Law Review, Winter, 1982, p. 275.
[34] Kansas, Missouri, Oklahoma and Wisconsin. *Id.*
[35] 530 N.W.2d 645 (N.D. 1995).

ground the appeal would be heard by a judge of the same court in which the conviction was rendered:

> "This is not only inefficient and duplicitous, but could create adversarial situations among equals. Such a circumstance cannot be allowed to exist. The appeal has been terminated by operation of law."

The North Dakota Supreme Court reversed, concluding that peer review was clearly contemplated by the legislature under these circumstances.

In drafting the amendments that authorized unification of California's trial courts, the problems of peer review were not ignored. To the extent our current system permits peer review, it should be addressed by appropriately balancing the interests of fairness, efficiency, and the appearance of justice. That balance might fully justify "peer review" of probable cause determinations at preliminary hearings, while precluding such review for dismissal motions. The appropriate place to strike that balance, of course, is in the legislature.

Conclusion

The contract for preparation of this background study requires the "contractor's suggestions, or possible alternative approaches, for any revisions in California's criminal procedures that appear appropriate. My recommendations include:

1. Full implementation of the proposals of the Ad Hoc Task Force on the Superior Court Appellate Divisions and the tentative recommendation of the California Law Revision Commission to implement those proposals;
2. Amendment of Penal Code Sections 859b, 861, 1004, 1381, 1381.5, 1385, 1387 and 1388 to require that motions to dimiss and demurrers be heard by judges of the superior court;
3. Amendment of Penal Code Sections 995 and 871.5 to preclude superior court review of rulings on dismissal motions and demurrers;
4. Limitation of the jurisdiction of magistrates to entertain dismissal motions other than pursuant to Penal Code § 871 (lack of probable cause);
5. Transfer of jurisdiction for extraordinary writs pursuant to Penal Code § 871.6 to the Courts of Appeal.

I do not recommend any change in the current procedures for the determination of probable cause by magistrates and the review of those determinations pursuant to Penal Code § 995, nor in the procedures in Penal Code § 1538.5 for review of magistrate's determinations of suppression motions.

Respectfully submitted,

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Professor of Law