CALIFORNIA JUDGES BENCHGUIDES

Benchguide 92

PRELIMINARY HEARINGS

[REVISED 2017]

JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR JUDICIAL EDUCATION AND RESEARCH

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PRELIMINARY HEARINGS

I. [§92.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of the procedure for handling a preliminary hearing or examination, and includes procedural checklists, an overview of the applicable law, scripts, and a flowchart.

For a discussion of felony arraignment and pleas, see California Judges Benchguide 91: *Felony Arraignment and Pleas* (Cal CJER).

For an in-depth discussion of preliminary hearings, see Simons, California Preliminary Examinations and 995 Benchbook (Matthew Bender, 2017 Ed.), cited here as Simons, Preliminary Examinations.

For a comprehensive discussion of Pen C §1538.5 suppression motions, see California Judges Benchguide 58: *Motions To Suppress and*

Related Motions: Checklists (Cal CJER) and California Judges Benchbook: *Search and Seizure*, chap 6 (2d ed Cal CJER).

II. PROCEDURE

A. [§92.2] Checklist: Prehearing Conference

(1) *Call the case*. Most judges conduct the prehearing conference in the courtroom. But some judges hold it in chambers.

(2) *Advise defendant of right to an attorney if an attorney has not been appointed or retained.* If defendant is unrepresented, the judge may postpone the preliminary hearing for not less than 2 nor more than 5 days so defendant can secure counsel. Pen C §860. Before appointing counsel, check that counsel is ready to proceed within statutory time limits, except in unusual cases. Pen C §987.05. See §§92.10–92.15.

☛ JUDICIAL TIP: In most cases, a defendant is advised of the right to counsel at the arraignment and counsel will have been obtained or appointed before the preliminary hearing.

(3) *Determine need for interpreter.* If defendant cannot understand English, continue the preliminary hearing until an interpreter is appointed. Cal Const art I, §14. See §92.17.

☛ JUDICIAL TIP: The need for an interpreter is normally determined at the arraignment so that an interpreter is available at the preliminary hearing.

(4) *If defendant's competency is in doubt, state doubt on record, and obtain defense counsel's opinion; if counsel concurs, order competency hearing.* If counsel does not concur, determine whether to order a hearing anyway. See Pen C §1368(a)–(b). After the competency hearing is ordered, suspend all proceedings except if defense counsel requests the preliminary hearing. Pen C §§1368(c), 1368.1.

☛ JUDICIAL TIP: If there is doubt about defendant's competency, the better course is to stop the preliminary hearing and order a competency hearing. This eliminates a second preliminary hearing if defendant is later found to have been incompetent at the first one under the two preliminary hearings rule of *Hale v Superior Court* (1975) 15 C3d 221, 223, 124 CR 57, and a nonstatutory motion to dismiss. Defense counsel who believes that probable cause is lacking may request a preliminary hearing to immediately resolve the issue. If doubt about defendant's competency arises during or after the preliminary hearing, it does not violate due

process to allow defendant to move for dismissal of the information if the case is bound over, and by holding a second preliminary hearing after competency is restored. *People v Duncan* (2000) 78 CA4th 765, 770, 93 CR2d 173.

(5) *Determine correctness of complaint.* Ask if counsel has reviewed the complaint for pleading and other errors, such as alleging a misdemeanor as a felony or misnaming defendant.

(6) *Explore possibility of negotiated plea.* Ask if counsel has considered disposing the case by negotiated plea. If not, and counsel is willing to confer, defer the prehearing conference for a short time to permit discussion. Most judges take an active part in plea discussions. See §§92.20–92.28.

(7) *Ask if defendant waives the preliminary hearing.* If defendant agrees, and the prosecutor concurs, take defendant's personal waiver. See §§92.29–92.35. See also §92.112 (script).

(8) *Take time waivers.* If there has been no waiver at the arraignment, ask if defendant will waive the 10-court-day and 60-calendar-day preliminary hearing time limits. If so, take the defendant's personal waiver. See §92.41.

(9) *If defendant does not waive time, ask if prosecution intends to move to continue preliminary hearing for good cause.* See §§92.37–92.38.

☛ JUDICIAL TIP: A codefendant case may create a problem when one codefendant requests a continuance for good cause and the other objects to the delay or requests OR release. Because good cause for a continuance for one defendant is good cause for all codefendants, the mandatory OR release under Pen C §859b will not apply to the nonrequesting codefendant. See *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491.

(10) *Determine if diversion or deferred entry of judgment is appropriate*. See §92.18.

(11) *Ask if defendant intends to move to felony to misdemeanor under Pen C §17(b)(5).* See §92.101.

(12) *Ask if defendant intends to move to close the hearing.* See §§92.54–92.58.

(13) *Ask if special precautions for minor witnesses under the age of 11 are needed.* See §92.63.

(14) *Ask if defendant intends to move to suppress preliminary hearing evidence.* See §§92.76–92.80.

(15) *Take defendant's plea, if any.* Ask if defendant will enter a guilty or no-contest plea. If so, advise defendant of the plea's rights and consequences. Some judges set the taking of pleas for a later calendar. See §92.114 (script when negotiated plea occurs in place of preliminary hearing). See also California Judges Benchguide 91: *Felony Arraignment and Pleas* §91.31 (Cal CJER) (alternative script for negotiated plea).

(16) *Determine bail if felony plea.* If defendant pleads guilty or no contest to a felony, determine bail and OR motions (see §§92.103–92.105) and set sentencing date.

(17) *Set misdemeanor plea for sentencing or impose sentence if defendant waives time under Pen C §1449.*

B. [§92.3] Checklist: Continuing Preliminary Hearing Beyond 10-Day Limits

(1) *Determine if preliminary hearing can be continued within 10-day limits (10 court days after later of arraignment or plea)*. See §92.36.

(2) *Determine if defendant is in custody.* If defendant is not in custody, delay of preliminary hearing beyond the 10-day limit is permitted unless defendant shows actual prejudice. See §92.42.

(3) *Determine if defendant is in custody solely on current charge.* If defendant is in custody solely on the current charge, the charge may be dismissed if preliminary hearing is scheduled beyond the 10-day limit without good cause. If defendant is not in custody solely on the current charge, dismissal is not required regardless of good cause. See §92.42.

☛ JUDICIAL TIP: Many judges rule on the "solely" issue on a case-by-case basis if defendant is also charged with violating court probation, felony probation, or parole. Some judges will review the files of defendants subject to court probation and find them to be in custody solely on the current charge if probation was violated based only on the current charge. The practice in some counties is to combine hearings on the solely issue and probation violation. But defendants who have violated formal felony probation or parole and whose original case files generally are not available for review are usually not found to be in custody solely on the current charge. See §92.42.

(4) *Determine if defendant is entitled to OR release.* A defendant in custody solely on the current charge whose preliminary hearing is scheduled after the 10-day limit by good cause may be entitled to OR release if exceptions in Pen C §859b (see below) do not apply. See §92.38.

(5) *Determine if any of these exceptions to automatic entitlement to OR apply*:

- Defendant requested continuance beyond 10-day limit,
- Capital case in which proof is evident and presumption great,
- Necessary witness is unavailable because of defendant's actions,
- Counsel is ill or unexpectedly in jury trial, or
- There is unforeseen conflict of interest requiring appointment of new counsel.

Pen C §859b. See §92.38. See also Appendix (flowchart diagram).

(6) *As appropriate, order*

- Release on OR,
- Dismissal, or
- That defendant be held in custody.

C. [§92.4] Checklist: Preliminary Hearing

(1) *Call the case.*

☛ JUDICIAL TIP: Some judges have their clerks hand them only the complaint and not the entire file. This reduces the risk of considering police reports and other extraneous materials when determining probable cause. With certain exceptions, a judge may not read an arrest report at the preliminary hearing. Pen C §1204.5. One exception is when the judge sets bail.

(2) *Determine if defendant is personally present.* In general, defendant must be personally present, but may waive or lose this right by disrupting the proceedings. Pen C §§977(b)(1), 1043.5. In a noncapital case, the magistrate may proceed with the preliminary hearing if defendant becomes voluntarily absent after the hearing has started in defendant's presence. Pen C §1043.5(b)(2). See §92.43.

☛ JUDICIAL TIP: When multiple defendants are joined in a case, some judges prepare a chart listing each defendant's name, location in the courtroom, charged offenses, and the evidence supporting each offense. This provides a convenient framework for determining probable cause for each defendant.

(3) *Advise defendant of right to an attorney if an attorney has not been appointed or retained.* The judge may postpone the preliminary

hearing for not less than 2 nor more than 5 days to allow defendant to secure representation. Pen C §860. Before appointing counsel, check that counsel is ready to proceed within the statutory time limits except in unusual cases. Pen C §987.05. See §§92.10–92.15.

(4) *Determine need for interpreter.* If defendant cannot understand English, continue the preliminary hearing until an interpreter is appointed. See Cal Const art I, §14. The court must appoint an interpreter for any witness who cannot understand English. Evid C §752. See §92.17.

(5) *If defendant's competency is in doubt, state doubt on record, and obtain defense counsel's opinion; if counsel concurs, order competency hearing.* If counsel does not concur, determine whether to order a competency hearing anyway. See Pen C §1368(a). After the competency hearing is ordered, all proceedings are suspended except if defense counsel requests a preliminary hearing. Pen C §§1368(c), 1368.1.

(6) *When appropriate, ask if defendant will waive one-session requirement.* If so, take defendant's personal waiver. If not, conduct the preliminary hearing in one session or consider postponing the hearing for good cause shown in an affidavit or declaration. See Pen C §861(a). See §§92.45–92.47. See also §92.113 (script for waiver).

(7) *Ask if defendant waives reading of complaint.* In most cases, defense counsel will waive the reading. See §92.48.

☛ JUDICIAL TIP: Most judges summarize the alleged charges even when a formal complaint reading is waived. This ensures that all interested parties know the alleged offenses. It also resolves problems that sometimes arise when an amended complaint has not been placed in the court's file or received by defense counsel.

(8) *Rule on any motions to close hearing, or to exclude and protect witnesses.* See §§92.51–92.61.

(9) *Call for presentation of evidence.* See §§92.65–92.69 (hearsay evidence and evidence limitations).

(10) *Rule on any motion to suppress evidence under Pen C §1538.5.* See §§92.76–92.80.

(11) *Account for all exhibits at close of evidence.* Before ruling on a holding order, the magistrate must know what exhibits have been admitted to evaluate what will be evidence to determine sufficient cause.

☛ JUDICIAL TIP: Many judges take notes on exhibits, listing what has been identified, offered, and admitted. At the end of the

evidentiary presentation, if any exhibits have been identified but not offered, invite the respective parties to offer them into evidence, hear any objection, and rule on admissibility.

(12) *Determine whether to reduce a wobbler felony to misdemeanor under Pen C §17(b)(5).* See §§92.101–92.102.

(13) *Determine if there is sufficient cause to hold defendant.* See §§92.86–92.92.

- If there is sufficient cause, issue a holding order under Pen C §872(a) (see §92.90) and decide any motion to set or reduce bail, or release defendant on OR (see §§92.103–92.105). If defendant is denied release, order defendant committed to custody.
- If there is not sufficient cause, dismiss the complaint and discharge defendant under Pen C §871 (see §92.92).

(14) *Include any evidentiary findings in the minutes.* See §§92.64–92.71.

III. APPLICABLE LAW

A. Preliminary Hearing Procedure Generally

1. Threshold Considerations

a. [§92.5] Conducting Prehearing Conference

Purpose. Most courts conduct a prehearing conference and generally schedule it 2 days before the preliminary hearing. This conference may be referred to as a preprelimnary hearing conference, a setting conference, or a preliminary hearing conference. One of its purposes is the early disposition of cases by plea (see §§92.20–92.28) or application of diversion or deferred entry of judgment (see §92.18) when feasible. The prehearing conference is also used to take waivers of time (see §92.41) and the preliminary hearing (see §§92.29–92.35), and to resolve pleading and other problems.

High-profile case. Some judges set the prehearing conference several days before the preliminary hearing. Among the matters considered is whether defendant will make a motion to close the hearing under Pen C §868 (see §92.54). If so, the court determines what and how the press should receive advance notice (see §92.56).

Anticipated motions. At the conference, many judges ask if defense counsel intends to move to suppress under Pen C §1538.5 at the preliminary hearing (see §§92.76–92.80). This helps the judge calendar the preliminary hearing realistically and explore the range of evidence to be

introduced, including the strengths and weaknesses of the parties' cases. This information may also permit the prosecutor to call witnesses necessary to litigate the motion, avoiding a continuance.

Many judges also ask if defense counsel intends to move at the preliminary hearing to reduce a wobbler charged as a felony to a misdemeanor under Pen C §17(b)(5) (see §§92.101–92.102) or if either party intends to move to close the hearing (see §§92.54–92.60).

Attendance at conference. The prosecutor, defense counsel, and defendant must be present at the conference as essential parties for effective plea negotiation.

b. [§92.6] Purpose of Preliminary Hearing

The preliminary hearing's purpose is to establish if there is probable cause to believe that defendant has committed a felony. Pen C §866(b); *Whitman v Superior Court* (1991) 54 C3d 1063, 1080–1081, 2 CR2d 160. A preliminary hearing may not be used for discovery. Pen C §866(b).

Deciding if probable cause exists at a preliminary hearing can weed out groundless charges of grave offenses and relieve the accused of the degradation and expense of a trial. It also can operate as a judicial check on the exercise of prosecutorial discretion and help ensure that defendant is not charged excessively, which could confer a tactical advantage upon the prosecutor in respect to plea bargaining. *People v Herrera* (2006) 136 CA4th 1191, 1202, 39 CR3d 578. Determining probable cause also ensures that defendant is not detained for a crime that was not committed. *People v Plengsangtip* (2007) 148 CA4th 825, 835, 56 CR3d 165.

A preliminary hearing is conducted by a magistrate after defendant has been arraigned and has pleaded not guilty to one or more felony charges lodged in the complaint. See Pen C §§738, 860.

The California Constitution requires a preliminary hearing for a defendant charged in a complaint with one or more felonies. Cal Const art I, §14. A preliminary hearing must be held before a magistrate to ensure that there is enough evidence to hold defendant to answer. See Pen C §872(a). A preliminary hearing cannot be held if a grand jury indictment initiates a felony prosecution. Cal Const art I, §14.1; *Bowens v Superior Court* (1991) 1 C4th 36, 49, 2 CR2d 376.

c. [§92.7] Probable Cause

The prosecution must present sufficient evidence to convince the magistrate that there is probable cause to believe that a crime has been committed and defendant committed it. Pen C §§866(b), 872(a). See §92.86. If the prosecution shows probable cause, the magistrate holds defendant to answer, and the prosecution must file an information within

15 calendar days. Pen C §§739, 1382(a)(1). If the magistrate finds insufficient evidence that probable cause exists, the magistrate must dismiss the case. See *People v Superior Court* (*Jurado*) (1992) 4 CA4th 1217, 1226, 6 CR2d 242. The magistrate must be convinced only of such facts as would lead a reasonable person to believe and conscientiously entertain a strong suspicion of defendant's guilt. *People v San Nicolas* (2004) 34 C4th 614, 654, 101 P3d 509; *Roman v Superior Court* (2003) 113 CA4th 27, 32, 5 CR3d 807; *Hatch v Superior Court* (2000) 80 CA4th 170, 184–185, 94 CR2d 453. The evidence that will justify a prosecution need not be sufficient to support a conviction. 80 CA4th 185. All that need be shown is some rational ground for assuming the possibility that an offense has been committed and that defendant committed it. 80 CA4th at 185.

d. [§92.8] Conducting Preliminary Hearing

Who may conduct hearing. Only a magistrate may conduct a preliminary hearing. *People v Haskett* (1982) 30 C3d 841, 858, 180 CR 640 (court commissioner may not conduct preliminary hearing absent all parties' consent); Simons, Preliminary Examinations §§4.9.1–4.9.2. Magistrates include judges of the supreme court, courts of appeal, and superior courts. Pen C §808. A judge who presides over a preliminary hearing does so in the capacity of a magistrate, not as a superior court judge. *People v Thompson* (1990) 50 C3d 134, 155, 266 CR 309. The magistrate may also preside over the trial of the case unless a ground for disqualification exists. *People v DeJesus* (1995) 38 CA4th 1, 17, 44 CR2d 796. A magistrate's preliminary hearing powers are statutory. *People v Superior Court* (*Feinstein*) (1994) 29 CA4th 323, 328, 34 CR2d 503.

See Simons, Preliminary Examinations §§4.8.1–4.8.6 (potential problems when same judge hears all pretrial proceedings in felony cases).

Duration of hearing. In most cases, the preliminary hearing is short, lasting from one-half to 2 hours. Most preliminary hearings involve only prosecution evidence and defense cross-examination of prosecution witnesses. But a defendant may be permitted to call witnesses to establish an affirmative defense on a proper showing. Pen C §866(a). See §92.69.

e. [§92.9] Proper Venue

A preliminary hearing may be heard in any superior court in the county where the offense occurred, although not necessarily in a specific judicial district. *Stanley v Justice Court* (1976) 55 CA3d 244, 249–255, 127 CR 532. Some venue statutes permit more than one county to be a proper site. See, *e.g.,* Pen C §§786–787, 791.

A magistrate has the authority to transfer the hearing to another judicial district in the same county, after balancing the parties' and the court's best interests, and considering the hardships. *Gray v Municipal Court* (1983) 149 CA3d 373, 375, 196 CR 808.

f. Appointing Counsel

(1) [§92.10] Advise of Right to Counsel

A defendant has a right to counsel at the preliminary hearing. *People v Coleman* (1988) 46 C3d 749, 772–773, 251 CR 83. See *Harris v Superior Court* (2014) 225 CA4th 1129, 1138–1144, 170 CR3d 780 (right to conflict-free assistance of counsel at preliminary hearing violated when defense counsel had been arrested by officer who testified at defendant's preliminary hearing and was being prosecuted for a felony by the same agency prosecuting defendant); *People v Anderson* (2015) 234 CA4th 1411, 1416–1419, 185 CR3d 75 (attorney's stipulation to earlier conduct subjecting him to State Bar discipline showed lack of competence to represent defendant at preliminary hearing because attorney "was guilty of willful conduct demonstrating his professional incompetence and resulting harm to a client and to the court").

At the arraignment before the preliminary hearing, the court must advise defendant of the right to an attorney, and that if defendant cannot afford an attorney, one will be appointed. Pen C §987(a)–(b). See California Judges Benchguide 91: *Felony Arraignment and Pleas* §91.6 (Cal CJER).

(2) [§92.11] Waiver of Right to Counsel

Advisement. Most defendants are represented by an attorney at the preliminary hearing. If defendant appears at the preliminary hearing without an attorney and the court has not taken a *Faretta* waiver (see California Judges Benchguide 91: *Felony Arraignment and Pleas* §§91.11–91.14 (Cal CJER)), the court must advise defendant of the right to counsel, and ascertain if defendant waives it. Cal Const art I, §15 (right to counsel at all critical stages of criminal proceeding); Pen C §§858, 859; *Coleman v Alabama* (1970) 399 US 1, 7, 90 S Ct 1999, 26 L Ed 2d 387; *People v Coleman* (1988) 46 C3d 749, 773, 251 CR 83; *People v Boulware* (1993) 20 CA4th 1753, 1756, 25 CR2d 381 (right to counsel at preliminary hearing waived when defendant elected to go forward with hearing despite court's willingness to grant continuance to obtain counsel).

Capital cases. In a capital case, the magistrate must inform defendant that he or she must be represented by counsel. Pen C §859. Such a defendant may not enter a guilty plea unless represented by counsel and

counsel consents. Pen C §1018. The right to counsel is self-executing. Defendant is not required to request counsel in order to be entitled to legal representation. *People v Marshall* (1997) 15 C4th 1, 20, 61 CR2d 84.

A defendant accused of a capital crime who elects self-representation (see below) may waive the right to counsel and other statutory and constitutional rights, such as the right to be present at all critical stages of the proceeding. *People v Farnam* (2002) 28 C4th 107, 146, 121 CR2d 106; *People v Koontz* (2002) 27 C4th 1041, 1074, 119 CR2d 859 (self-representation right guaranteed by *Faretta* applies in capital case); *People v Lawley* (2002) 27 C4th 102, 145, 115 CR2d 614 (self-represented defendant has no constitutional right to advisory counsel).

Self-representation. The Sixth Amendment gives defendants the right to self-representation. *Faretta v California* (1975) 422 US 806, 819, 95 S Ct 2525, 45 L Ed 2d 562; *People v Koontz*, *supra*, 27 C4th at 1069. Current law provides that the court must find that defendant is mentally competent to represent himself or herself. See *Indiana v Edwards* (2008) 554 US 164, 169–178, 128 S Ct 2379, 171 L Ed 2d 345.

The defendant's request for self-representation must be a knowing, voluntary, unequivocal, and timely assertion of that right. *People v Scott* (2001) 91 CA4th 1197, 1203–1206, 111 CR2d 318 (untimely and equivocal request is properly denied). See also *People v Lynch* (2010) 50 C4th 693, 724, 114 CR3d 63, overruled on other grounds in 52 C4th 610, 620–643 (trial court may consider totality of circumstances in determining whether defendant's pretrial motion for self-representation is timely). A defendant is entitled to exercise this right if defendant is mentally competent, literate, fully informed of the right to counsel, and understands the dangers of self-representation. *People v Silfa* (2001) 88 CA4th 1311, 1322–1323, 106 CR2d 761 (judge may not determine defendant's competence to waive counsel by evaluating defendant's ability to act as his or her own attorney). See *People v Dent* (2003) 30 C4th 213, 217–222, 132 CR2d 527 (judge committed reversible error by denying defendant's request for self-representation on improper basis, *i.e.,* because it was a death penalty murder trial); *People v Carlisle* (2001) 86 CA4th 1382, 1385, 103 CR2d 919 (judge committed reversible error by denying defendant's repeated requests for self-representation; defendant wanted to discharge defense counsel who had been appointed to represent him at preliminary hearing and, when denied *Marsden* request for appointment of substitute counsel, requested right to represent himself); *Moon v Superior Court* (2005) 134 CA4th 1521, 1530–1531, 36 CR3d 854 (that defendant's unequivocal request to represent himself was made after preliminary hearing started did not make it disruptive or untimely; denial of request was denial of substantial right and grounds for setting aside information).

The judge must make defendant aware of the dangers and disadvantages of self-representation, *e.g.,* a defendant cannot rely on the judge to provide personal instruction on courtroom procedure, to provide assistance that would normally be provided by counsel, or to provide an advisement of any right, including the privilege against compelled self-incrimination. *People v Barnum* (2003) 29 C4th 1210, 1220–1221, 1226, 131 CR2d 499; *People v Lawley*, *supra*, 27 C4th at 142 (adequate admonition in death penalty case of risks of self-representation, including advisement of limited role of advisory counsel). See *People v Koontz*, *supra*, 27 C4th at 1063–1069 (judge is not required to conduct a competency hearing before granting defendant's request for self-representation, when defendant does not lack either an understanding of the nature of the proceedings or ability to conduct his or her own defense, but rather lacks legal training common to most pro per defendants). See also *People v Lopez* (1977) 71 CA3d 568, 572–574, 138 CR 36 (suggested advisements and inquiries to ensure clear record of defendant's knowing and voluntary waiver of counsel); *People v Burgener* (2009) 46 C4th 231, 243, 92 CR3d 883 (defendant's waiver of counsel was not knowing and intelligent because he was not made aware of dangers and disadvantages of self-representation when trial court failed to advise him that district attorney would be both experienced and prepared, that defendant would receive no special consideration or assistance from court and would be treated like any other attorney, that he would have no right to standby or advisory counsel, or that he would be barred from appealing adequacy of his representation). See California Judges Benchguide 54: *Faretta and Marsden Issues* §§54.4–54.21 (Cal CJER) (issues judge must consider when defendant requests self-representation).

Forfeiture of right to counsel. A defendant may forfeit the right to counsel by a course of serious misconduct toward counsel showing that lesser measures to control defendant, such as warnings or physical restraint, are insufficient to protect counsel. A forfeiture proceeding calls for considerable due process protections, including the rights to produce evidence, cross-examine adverse witnesses, appear by counsel, and the right to an impartial decision-maker. Before declaring a forfeiture, the judge should (1) give explicit warnings that if defendant's misconduct persists, defendant will forfeit the right to counsel and have to proceed in pro per; (2) ensure that defendant knows of the dangers of self-representation; (3) make a clear ruling of forfeiture; and (4) make factual findings supporting the ruling by clear and convincing evidence and put them on the record. *King v Superior Court* (2003) 107 CA4th 929, 132 CR2d 585.

(3) [§92.12] Time To Obtain Counsel

A defendant who wants an attorney must be given a reasonable time to obtain one. The court may postpone the preliminary hearing for not less than 2 nor more than 5 days to allow defendant to secure representation. Pen C §860.

Even in the absence of a specific statute, the constitutional rights to counsel and due process require that a defendant receive a reasonable continuance to secure chosen counsel if defendant shows the financial ability to do so. *People v Courts* (1985) 37 C3d 784, 789–796, 210 CR 193. To make this determination, the court may ask defendant to submit a financial statement. Pen C §987(c). The court may also ask defendant to file a financial statement to determine if defendant qualifies for a public defender. Govt C §27707.

(4) [§92.13] Appointing Public Defender

The court must appoint an attorney if defendant wants and cannot afford one. Pen C §987(a)–(b); *People v Lara* (2001) 86 CA4th 139, 150, 103 CR2d 201. The court must first try to appoint the public defender; it may appoint private counsel only if no public defender is available or the public defender has a conflict of interest. See Pen C §987.2(a); Govt C §27706; *People v Hall* (1978) 87 CA3d 125, 133–134, 150 CR 628. See also *People v Lopez* (2008) 168 CA4th 801, 808, 85 CR3d 675 (no conflict when public defender represents defendant and another public defender from same office previously represented prosecution witness if the public defenders do not speak, defendant's public defender does not read witness's file, and no one in office has received anything confidential from witness). If the court has granted defendant's self-representation request, it may not appoint the public defender as standby counsel. *Dreiling v Superior Court* (2000) 86 CA4th 380, 382, 103 CR2d 70.

Appointment of attorney other than defendant's requested attorney. The constitutional and statutory guarantees of the assistance of counsel are not violated by the appointment of an attorney other than the one defendant requests. It does not abuse discretion for the court to appoint an attorney other than the one requested when the requested attorney has no particular familiarity with the case. See *People v Horton* (1995) 11 C4th 1068, 1098–1099, 47 CR2d 516; *People v Robinson* (1997) 53 CA4th 270, 277–278, 61 CR2d 587.

Multiple defendants. If multiple indigent defendants appear without counsel at the preliminary hearing, the court must appoint separate counsel for each defendant. *People v Mroczko* (1983) 35 C3d 86, 115–116, 197

CR 52, disapproved on another ground in 45 C4th 390, 421 n22. See Simons, Preliminary Examinations §2.1.2.

Appointment of more than one attorney. A defendant's right to an appointed attorney does not include the right to require the court to appoint more than one attorney, except when the first appointed attorney is not adequately representing defendant. *People v Lara, supra,* 86 CA4th at 150.

Determination of counsel's readiness to proceed. Before appointing the public defender or private defense counsel, the court must check if counsel will be ready to proceed with the preliminary hearing and trial within the prescribed statutory time limits except in unusual instances where the court finds that because of the case's nature, counsel cannot reasonably be expected to be ready within the period. Pen C §987.05. In that instance, the court must set a reasonable time for preparation. Pen C §987.05. The court may not consider counsel's convenience, calendar conflicts, or other business. The court may allow counsel a reasonable time to become familiar with the case to determine if counsel can be ready. Pen C §987.05. If counsel promises to be ready for the preliminary hearing but is not ready and lacks good cause, the court may relieve counsel from the case and impose sanctions. Pen C §987.05. Sanctions may include finding counsel in contempt, imposing a fine, or denying public funds as compensation. Pen C §987.05. The prosecutor and defense counsel have a right to present evidence and argument as to a reasonable preparation time and any reasons why counsel could not be prepared in the set time. Pen C §987.05. See Simons, Preliminary Examinations §2.1.6.

Notice about repaying costs. Before appointing counsel for an indigent defendant, the court must notify defendant that it may order defendant to pay all or part of the cost of counsel if after a hearing the court determines that defendant is able to pay. Pen C §987.8(f). The notice must inform defendant that such an order has the same force and effect as a judgment in a civil action, and is enforced against defendant's property the same as any other money judgment. Pen C §987.8(f); *People v Smith* (2000) 81 CA4th 630, 637–638, 96 CR2d 856 (adequacy of notice).

(5) [§92.14] Right to Counsel Prevails Over 10-Day Requirement

Defendant's right to effective assistance of counsel trumps the right to a preliminary hearing within 10 days under Pen C §859b. See *People v Kowalski* (1987) 196 CA3d 174, 179, 242 CR 32; §§92.37, 92.41.

(6) [§92.15] Self-Represented Litigant's Request for Counsel at Hearing

When a pro per defendant asks to have counsel appointed on the day of the preliminary hearing, the magistrate may, but need not, do so. *People v Boulware* (1993) 20 CA4th 1753, 1756, 25 CR2d 381 (prosecutor present in court and witness present and ready to testify when request made). It did not abuse discretion to hold the preliminary hearing without appointing counsel, instead of appointing counsel and continuing the preliminary hearing over defendant's objection. *People v Boulware, supra* (defendant wanted to hold hearing as scheduled).

(7) [§92.16] *Marsden* Motions

The magistrate may grant or deny a defendant's *Marsden* motion made at the preliminary hearing to replace appointed counsel. *People v Smith* (2003) 30 C4th 581, 134 CR2d 1; *People v Silva* (2001) 25 C4th 345, 366–367, 106 CR2d 93 (judge made sufficient inquiry into defendant's reasons for requesting substitute counsel); *People v Barnett* (1998) 17 C4th 1044, 1083–1087, 74 CR2d 121. See *People v Marsden* (1970) 2 C3d 118, 123, 84 CR 156. The magistrate must permit defendant to explain the basis of the alleged inadequate representation and to relate specific instances of the attorney's inadequate performance.

A defendant is entitled to relief if the appointed attorney is not providing adequate representation or if defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely. *People v Smith, supra*, 30 C4th at 604; *People v Barnett, supra*, 17 C4th at 1085. Denial of defendant's request does not abuse discretion unless defendant shows that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel. 17 C4th at 1085. The magistrate need not conclude that an irreconcilable conflict exists if defendant has not tried to resolve any disputes with counsel and has not given counsel a fair opportunity to show trustworthiness. *People v Smith, supra*, at 606.

Disagreement about tactics alone is insufficient to compel replacement. 30 C4th at 606. If there is a credibility question between defendant and counsel, the magistrate may accept counsel's explanation. *People v Jones* (2003) 29 C4th 1229, 1245–1246, 131 CR2d 468 (if defendant's claimed lack of trust in or inability to get along with appointed counsel were sufficient to compel substitute counsel, defendants would effectively have veto power over any appointment and could obtain a preferred attorney by process of elimination, which is not the law). A defendant may not force counsel's substitution by contentious conduct; instead, defendant must show what counsel has done to cause a breakdown

of the relationship. *People v Smith, supra*, 30 C4th at 606; *People v Michaels* (2002) 28 C4th 486, 523, 122 CR2d 285 (defendant cannot refuse to cooperate with appointed counsel to compel removal). The magistrate need not appoint independent counsel to assist defendant in moving to substitute counsel. *People v Hines* (1997) 15 C4th 997, 1024–1025, 64 CR2d 594.

A defendant's request to self-represent if counsel is not removed is a conditional self-representation request; the magistrate may require defendant to choose to proceed with existing counsel or self-represent. *People v Michaels, supra,* 28 C4th at 523–524. When a magistrate denies a defendant's preliminary hearing request for substitute counsel, the court may also deny defendant's self-representation request if it is not unequivocal. *People v Barnett, supra,* 17 C4th at 1087–1088.

g. [§92.17] Appointing Interpreter

If defendant cannot understand English, the court must continue the preliminary hearing until an interpreter is appointed. Cal Const art I, §14 (defendant unable to understand English has right to interpreter throughout criminal proceedings); *People v Superior Court* (*Almaraz*) (2001) 89 CA4th 1353, 1357–1359, 107 CR2d 903 (describing right to interpreter under constitution, statutes, and case law); *People v Carreon* (1984) 151 CA3d 559, 567, 198 CR 843 (court must appoint interpreter on showing of need). The court must appoint a separate interpreter for each codefendant who cannot understand English. *People v Rodriguez* (1986) 42 C3d 1005, 1013–1016, 232 CR 132.

The court must also appoint an interpreter for any witness who cannot understand English. Evid C §752. The court may not assign defendant's interpreter to interpret for a witness; separate interpreters are required. *People v Aguilar* (1984) 35 C3d 785, 793, 200 CR 908.

Standard 2.10 of the Standards of Judicial Administration lists the standards and procedure for determining the need for a court interpreter, including specific questions the court should ask defendant or witness. After examining defendant or witness, the court should state its conclusion on the record. The case file should be clearly marked to ensure that an interpreter will be present when needed. Cal Rules of Ct, Standards of J Admin 2.10(d). For good cause, the court should authorize a preappearance interview between the interpreter and the party or witness. Cal Rules of Ct, Standards of J Admin 2.10(e). Standard 2.11 contains instructions the court should give the interpreter and counsel.

Any person who interprets in a court proceeding using a language designated by the Judicial Council must be certified, unless good cause is shown. Govt C §68561(a). The procedure for selecting a noncertified

interpreter in a criminal case is listed in Cal Rules of Ct 2.893. A judge's failure to follow this procedure in selecting an interpreter for defendant does not violate the constitutional right to an interpreter, because this right encompasses only a right to a competent interpreter, not a right to a certified interpreter. *People v Superior Court* (*Almaraz*), *supra*, 89 CA4th at 1359–1360. Improper procedures in the use of an interpreter do not rise to the level of a constitutional violation unless they deprive defendant of a fair trial. 89 CA4th at 1360.

California Rules of Court 2.890 lists requirements for interpreters. See Simons, Preliminary Examinations §§2.2.8–2.2.11.

Language Access Plan. The Judicial Council has adopted a comprehensive Language Access Plan (LAP) that provides a consistent statewide approach to ensure language access for all limited English-proficient California court users. This plan is currently being implemented in all 58 trial courts.

One of the plan's key goals is to ensure that by 2017, qualified interpreters will be provided in the California courts to limited English-proficient court users in all courtroom proceedings and, by 2020, in all court-ordered, court-operated events.

For more information, please see Bench Card: Working with Court Interpreters, in the Language Access section of the Access, Ethics & Fairness Toolkit on CJER Online.

h. [§92.18] Considering Diversion or Deferred Entry of Judgment

Certain defendants may be eligible for diversion or deferred entry of judgment. Pen C §1001.52(a) (misdemeanor diversion), Pen C §1001.72(a) (parental diversion), Pen C §1001.22 (cognitive developmental disability diversion), Pen C §1000.1(b) (drug deferred entry of judgment). If defendant consents, refer the case to the probation department for an investigation and report; a preliminary hearing is not required. Pen C §§1000.1(b), 1001.52(a), 1001.72(a), 1001.22. The court should inform defendant that statements made to the probation officer may not be used adversely in any later criminal action or proceeding. Pen C §1000.1(c) (drug deferred entry of judgment), Pen C §§1001.5, 1001.52(b) (misdemeanor diversion), Pen C §1001.72(b) (parental diversion), Pen C §1001.24 (cognitive developmental disability diversion).

i. [§92.19] Military Defendants

A defendant who is on active duty in the military or is a military veteran, as defined in Pen C §858(c), has rights under Pen C §1170.9 and related statutes. Pen C §858(d). The court must inform defendant that

defendant may request a copy of Judicial Council form MIL-100, Notification of Military Status, that explains those rights, and may file that form with the court. Pen C §858(d). Further, the court must advise defendant to consult with counsel before submitting the form, and that there is no penalty for declining to provide the information requested on the form. Pen C §858(d).

If defendant files the form with the court, defendant must also serve the form on defense counsel and the prosecutor. Pen C §858(e). The form may help determine defendant's eligibility for services under Pen C §1170.9. Pen C §858(e). The court must send a copy of the form to the county veterans services officer, for verification of defendant's military service, and the Department of Veterans Affairs. Pen C §858(e).

2. [§92.20] Handling Plea Bargains

At the prehearing conference, most judges ask if counsel have discussed a negotiated plea. Judges generally take an active role in urging counsel to attempt to resolve the case by negotiation.

If an offered and accepted plea negotiation includes a reducing a felony charge to a misdemeanor, judges frequently arraign defendant and impose a misdemeanor sentence immediately on acceptance of the plea, after obtaining defendant's waiver of the Pen C §1449 time limits.

Sometimes a plea is not accepted until the time of the preliminary hearing. In that case, judges may hear and investigate the negotiated plea rather than conduct a preliminary hearing. See §92.114 (sample script).

A felony plea bargain must be made on the record. Pen C §1192.6; *People v West* (1970) 3 C3d 595, 610, 91 CR 385. If defendant is eligible for probation, the judge must refer the case to the probation officer for a report under Pen C §1203 before sentencing. Pen C §1191.

☛ JUDICIAL TIP: Be aware of your court's procedures for handling Proposition 36 cases when taking pleas. A case that involves a nonviolent felony and a non-drug-related misdemeanor may not have been a Proposition 36 case initially, but if the misdemeanor is dropped as part of the plea bargain, defendant may become eligible for Proposition 36 treatment. See Pen C §§1210, 1210.1.

a. Requirements for Approval of Plea

(1) [§92.21] Advisement and Waiver of Rights

A guilty plea is valid only if it is made voluntarily and knowingly. *Boykin v Alabama* (1969) 395 US 238, 242, 89 S Ct 1709, 23 L Ed 2d 274. Before accepting the plea or an admission of charged enhancements, the court must expressly advise defendant and obtain a waiver of the

constitutional rights to jury trial, confrontation and cross-examination of witnesses, and must advise against self-incrimination. The record must show explicit advisements and waivers. 395 US at 243; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577, overruled on other grounds in 10 C3d 288, 307; see *People v Howard* (1992) 1 C4th 1132, 1178–1179, 5 CR2d 268.

There is no formula for advising a defendant of constitutional rights. *People v Wharton* (1991) 53 C3d 522, 582, 280 CR 631. The record must show by direct evidence, given the totality of circumstances, that defendant was fully aware of the rights. *People v Murillo* (1995) 39 CA4th 1298, 1304, 46 CR2d 403. The court should ensure there is an adequate record for appeal and to protect a guilty plea's validity by making its advisements, confirming defendant understands these rights, and ensuring that waivers are as complete and explicit as possible. 39 CA4th at 1304.

(2) [§92.22] Advisement of Plea's Direct Consequences

The record must show that defendant understands the charges and the direct consequences of the plea or admission. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902, overruled on other grounds in 54 C4th 177, 183. This requirement extends only to the primary and direct penal consequences of the imminent conviction. It is a judicially declared rule of criminal procedure, not a constitutional requirement. *People v Barella* (1999) 20 C4th 261, 266, 84 CR2d 248.

A direct consequence has a definite, immediate, and largely automatic effect on the range of defendant's punishment. *People v Moore* (1998) 69 CA4th 626, 630, 81 CR2d 658. Direct consequences include restitution, probation ineligibility, and sex offender registration. A collateral consequence does not inexorably follow from a conviction of the offense involved in the plea, *e.g.,* the possibility of enhanced punishment in the event of a future conviction or probation revocation in another case, or limitations on the ability to earn conduct and work credits while in prison. 69 CA4th at 630–633 (court not required to advise defendant that he might eventually be subject to additional confinement under Sexually Violent Predator Act (Welf & I C §§6600 et seq), because such confinement collateral, not direct or penal, consequence of plea). See also *People v Aguirre* (2011) 199 CA4th 525, 528, 131 CR3d 785 (trial court need not advise defendant that plea might be used adversely in federal proceedings, as that is collateral consequence).

See California Judges Benchguide 91: *Felony Arraignment and Pleas* §91.27 (Cal CJER) (comprehensive list of direct consequences).

(3) [§92.23] Factual Basis

A court must find a factual basis for a negotiated plea of guilty or no contest before accepting it. Pen C §1192.5; *People v Holmes* (2004) 32 C4th 432, 438–442, 9 CR3d 678. The factual basis required by Pen C §1192.5 is a prima facie factual basis for the charge. The court need not interrogate defendant about possible defenses to the charge, nor does it have to be convinced of defendant's guilt. 32 C4th at 441.

To comply with Pen C §1192.5, the court must garner information about the factual basis from defendant or defense counsel. 32 C4th at 442. If the court questions defendant about the factual basis, it may develop the factual basis for the plea on the record by having defendant describe the conduct giving rise to the charge, or questioning defendant about the detailed factual basis described in the complaint or written plea agreement. If the court questions defense counsel about the factual basis, counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea form. 32 C4th at 442.

Many courts ask the prosecutor to recite a brief factual statement, which should include all elements of the crime and refer to the police report, then ask defense counsel to agree to these facts. Trial counsel's bare stipulation that there is a factual basis, without reference to any documents in the record containing factual allegations, is insufficient to establish an adequate factual basis for the defendant's plea. *People v Willard* (2007) 154 CA4th 1329, 1333–1335, 65 CR3d 488 (*Holmes, supra,* is clear there must be some reference to a factual source to support the essential elements of the crime).

☛ JUDICIAL TIP: Although *People v Holmes*, *supra*, allows the factual basis to be established from reference to the police report alone, the better practice is to have the record reflect an affirmative statement made in defendant's presence and agreed to by counsel. A discussion on the record may help the court rule on a later motion to withdraw the plea based on a lack of understanding of the charges.

(4) [§92.24] Additional Waivers

Arbuckle waiver. When a judge accepts a negotiated plea and retains sentencing discretion, it is implied that the sentence will be imposed by that judge. If another judge will impose the sentence, the court should ask defendant or counsel for an *Arbuckle* waiver at the time of plea. If defendant's case is assigned to a different judge for sentencing and an

Arbuckle waiver was not given, defendant may withdraw the plea. *People v Arbuckle* (1978) 22 C3d 749, 756–757, 150 CR 778.

The *Arbuckle* rule does not apply when the judge's unavailability arises from circumstances clearly beyond the power of the court, such as the judge's resignation, retirement, illness, or death. *People v Jackson* (1987) 193 CA3d 393, 403, 238 CR 327 (illness); *People v Dunn* (1986) 176 CA3d 572, 575, 222 CR 273 (retirement); *People v Watson* (1982) 129 CA3d 5, 7, 180 CR 759 (death).

Harvey waiver. Also implicit in a plea bargain is the understanding that defendant will not suffer any adverse sentencing consequences by reasons of facts underlying, and pertaining solely to, any dismissed counts or cases that are not transactionally related to the crime(s) for which defendant is being sentenced. If the court will be considering such counts or cases for the purposes of determining restitution or punishment, the court should secure a *Harvey* waiver. *People v Harvey* (1979) 25 C3d 754, 757–759, 159 CR 696; *People v Beck* (1993) 17 CA4th 209, 215, 21 CR2d 250. A waiver is not required if the dismissed counts are transactionally related. *People v Harvey*, *supra*, 25 C3d at 758; *People v Bradford* (1995) 38 CA4th 1733, 1737–1739, 45 CR2d 757. See also *People v Beagle* (2004) 125 CA4th 415, 420–421, 22 CR3d 757, and *People v Martin* (2010) 51 C4th 75, 82, 119 CR3d 99 (court may not impose a probation condition based on dismissed charges absent *Harvey* waiver).

Cruz waiver. The court may ask defendant to agree, as part of the plea agreement, that the court may withdraw its approval of the plea and impose a sentence in excess of the bargained-for-term should defendant fail to appear for sentencing. This waiver of the right to withdraw a plea under Pen C §1192.5 should a court disapprove a plea bargain is called a *Cruz* waiver. *People v Cruz* (1988) 44 C3d 1247, 1254 n5, 246 CR 1; *People v Masloski* (2001) 25 C4th 1212, 1216–1223, 108 CR2d 484. Absent such a provision, a defendant does not lose the protection of Pen C §1192.5 by failing to appear for sentencing. *People v Cruz, supra*, 44 C3d at 1249. The failure to appear does not breach the terms of the plea agreement, but is a separate offense. See Pen C §§1320, 1320.5; 44 C3d at 1253.

b. [§92.25] Guilty Plea Without Counsel

Noncapital cases. A self-representing defendant in a noncapital case may enter into a negotiated plea. *People v Ingels* (1989) 216 CA3d 1303, 1306–1308, 265 CR 521. Although Pen C §859a requires that counsel be present for defendant to plead guilty at the preliminary hearing, this requirement is unconstitutional for a self-represented defendant. *People v Ingels, supra*.

Capital cases. A self-representing capital case defendant may not enter a guilty plea unless represented by counsel and counsel consents. Pen C §1018. See *People v Chadd* (1981) 28 C3d 739, 750–754, 170 CR 798 (Pen C §1018 does not run afoul of *Faretta*).

c. [§92.26] After Plea Has Been Approved

Required advisements. If the judge approves the negotiated plea, the judge must inform defendant before taking the plea that (Pen C §1192.5)

- The judge's approval is not binding.
- The judge may, at the time of the hearing on the application for probation or pronouncement of judgment, withdraw the judge's approval of the plea in light of further consideration.
- In such a case, defendant may withdraw the plea.

Sex offender registration requirement. If the prosecutor accepts and the judge approves the plea in open court, defendant cannot be sentenced to a punishment more severe than the plea. Pen C §1192.5; *People v Walker* (1991) 54 C3d 1013, 1024, 1 CR2d 902, overruled on other grounds in 54 C4th 177, 183. However, the California Supreme Court has held that the sex offender registration requirement is not a permissible subject of plea negotiation because it is statutorily mandated. Thus, imposing the registration requirement does not violate a plea bargain, even if the court has not advised defendant of the requirement before entering the plea. *People v McClellan* (1993) 6 C4th 367, 379–381, 24 CR2d 739. When a defendant agrees to a plea bargain and pleads guilty to an offense not included in the sex offender registration statute, and the plea bargain also does not include the registration requirement, the sentencing court may not impose registration. *People v Olea* (1997) 59 CA4th 1289, 1296–1299, 69 CR2d 722. The court need not strike the requirement, however, but may consider whether the bargain's punishment is adequate and, if not, allow defendant to withdraw the plea or accept a new one that includes registration. 59 CA4th at 1298–1299.

Sentencing. If the prosecutor accepts and the judge approves the plea in open court, defendant cannot be sentenced to a punishment less severe than the plea absent the prosecutor's agreement. *People v Tang* (1997) 54 CA4th 669, 680, 62 CR2d 876; *People v Superior Court* (*Gifford*) (1997) 53 CA4th 1333, 1336–1339, 62 CR2d 220 (judge imposed probation instead of plea's 3-year prison term). A judge who accepts a plea bargain lacks jurisdiction to make the terms more favorable to defendant. 53 CA4th at 1337–1338. The judge has broad discretion, however, to withdraw prior approval of the plea before sentencing. Pen C §1192.5; 53 CA4th at 1338–1339.

Under Pen C §1192.5, if the prosecution accepts and the judge approves a plea agreement, defendant cannot be sentenced to a punishment more severe than the plea. If the judge later withdraws approval of the plea, the defendant must be permitted to withdraw the plea. Pen C §1192.5; *People v Masloski* (2001) 25 C4th 1212, 1217, 108 CR2d 484.

Unless it specifies otherwise, a plea agreement that provides for a maximum sentence inherently reserves the parties' right to a sentencing proceeding in which (1) they may litigate the appropriate individualized sentence choice within the constraints of the bargain and the court's lawful discretion, and (2) appellate challenges to the judge's sentencing decision, otherwise available, are retained. Such a challenge does not attack the validity of the plea, and a probable cause certificate under Pen C §1237.5 is therefore not required in order to appeal. *People v Buttram* (2003) 30 C4th 773, 777, 134 CR2d 571 (this type of agreement contemplates that judge will choose from range of sentences within maximum, and that abuses of discretionary sentencing authority will be reviewable on appeal).

d. [§92.27] Plea Not Approved

If the prosecutor does not accept and the judge does not approve the plea, it is considered withdrawn, and defendant may enter any plea. Pen C §1192.5. A plea that is withdrawn or considered withdrawn may not be received in evidence in any criminal or civil proceeding, or any special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals. Pen C §1192.5.

e. [§92.28] Limitation on Pleas

Penal Code §§1192.5 and 1192.7 specify the offenses that may not be plea bargained. In a three strikes case, the prosecutor may not make any plea bargain to strike or seek the dismissal of prior serious and/or violent felony convictions. Pen C §§667(g), 1170.12(e). However, the prosecutor may move to dismiss or strike a prior serious and/or violent felony in furtherance of justice or if there is insufficient evidence to prove the prior. If the judge is satisfied that there is insufficient evidence to prove the prior, the judge may dismiss or strike the allegations. Pen C §§667(f)(2), 1170.12(d)(2).

3. [§92.29] Waiving Right to Preliminary Hearing

A defendant, with the concurrence of the prosecutor, may waive the right to a preliminary hearing either by pleading guilty or by simply waiving the right to a preliminary hearing. See Pen C §§859b, 860. A defendant may waive the hearing without entering a guilty plea only if represented by counsel. Pen C §860. This requirement may be

unconstitutional for a self-representing defendant. See *People v Ingels* (1989) 216 CA3d 1303, 1306, 265 CR 521.

a. [§92.30] Waiver Must Be Personal

Defendant must personally waive the right to a preliminary hearing; counsel's waiver is insufficient. See Pen C §§859b(a), 860; *People v Kowalski* (1987) 196 CA3d 174, 178, 242 CR 32. Any waiver of the right to a preliminary hearing must be voluntary. See Pen C §859b; *In re Watson* (1972) 6 C3d 831, 839–841, 100 CR 720, disapproved on another ground in 45 C4th 390, 421 n22. Before taking a defendant's waiver, many judges ask defendant if any promises or threats have been made to induce defendant to give up the right to a preliminary hearing. They expressly find that the waiver was personal, voluntary, and knowing.

b. [§92.31] Advise of Rights Before Waiver

Before taking defendant's waiver, the magistrate should advise defendant of the right to

- A preliminary hearing. The magistrate should carefully explain the nature of the hearing and what will follow in court.
- Require the prosecutor to prove that there is probable cause to believe the defendant is guilty of all charges in the complaint.
- See and hear any prosecution witnesses testifying in open court and to have defense counsel cross-examine them.
- Present a defense and to testify on his or her own behalf.

After explaining each right, most judges ask if defendant understands and waives it. *Boykin v Alabama* (1969) 395 US 238, 89 S Ct 1709, 23 L Ed 2d 274; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577, overruled on other grounds in 10 C3d 288, 307; *People v Wright* (1987) 43 C3d 487, 491, 233 CR 69, abrogated on another ground in 1 C4th 1132, 1174–1178. See §92.112 (script).

c. [§92.32] Waiver Without Plea of Guilty

After the waiver is taken without entering a guilty plea, the magistrate must make an order holding defendant to answer. Pen C §860. See §92.86. A reporter's transcript of the waiver should be prepared and submitted to the court as if there has been a preliminary hearing. See §92.49. The magistrate should also hear any bail or OR motion made by defendant. See §§92.103–92.105. The prosecutor must file an information with the court within 15 days, although defendant may waive time for arraignment. Pen C §§860, 1382. In some courts, the magistrate may conduct the

arraignment, discuss time waivers with the parties, take defendant's plea, and discuss trial setting with counsel.

d. [§92.33] Waiver by Pleading Guilty or No Contest

A defendant charged with a felony may waive a preliminary hearing by pleading guilty or no contest. Pen C §859a. The procedure is (Pen C §859a):

- On counsel's appearance, the magistrate must read the complaint to defendant and ask how defendant pleads to the charged offense and to any charged previous conviction.
- When counsel is present, defendant may plead guilty to the charged offense, or, with the consent of the magistrate and the prosecutor, may plead no contest. Defendant may also plead guilty or no contest to any lesser included charge, to an attempt to commit the charged offense, or to a previous conviction. See §§92.21–92.24 (requirements of guilty pleas).
- The magistrate may then fix bail and may take defendant into custody if defendant fails to deposit bail.
- The magistrate must certify the case for judgment and sentencing. In some courts, the magistrate may set the sentencing date in the magistrate's own department depending on local practice. The magistrate may also refer the case to the probation officer if defendant is eligible for probation. See Pen C §1191; Cal Rules of Ct 4.114.

Although Pen C §859a requires that counsel be present for defendant to plead guilty at the preliminary hearing, this requirement is unconstitutional for a self-representing defendant. See *People v Ingels* (1989) 216 CA3d 1303, 1306, 265 CR 521.

e. [§92.34] Rejection of Defendant's Waiver

Even when defendant wants to waive a preliminary hearing, the magistrate or the prosecutor may object and require one. Pen C §860.

f. [§92.35] Rules To Dispose of Cases Before Preliminary Hearing

Courts with more than three judges must in cooperation with the district attorney and defense bar adopt procedures to facilitate disposition of cases before the preliminary hearing. Cal Rules of Ct 10.953(a). These procedures may include early, voluntary, and informal discovery, as well as the use of superior court judges as magistrates to conduct readiness

conferences before the preliminary hearing and to assist in the early disposition of cases. Cal Rules of Ct 10.953(a). Pleas of guilty or no contest resulting from these procedures are disposed of under Cal Rules of Ct 4.114, discussed in §92.33. Cal Rules of Ct 10.953(b).

4. Time Limitations

a. [§92.36] 10-Day and 60-Day Time Limits

The preliminary hearing must be held not less than 2 nor more than 10 court days from the date defendant is arraigned or enters a plea, whichever is later. Pen C §859b. Weekends and holidays are not counted. CC §11; Govt C §6706. The magistrate sets the time for the preliminary hearing when defendant appears for arraignment unless one of these occurs (Pen C §859b):

- Defendant waives preliminary hearing and chooses to plead guilty as specified in Pen C §859a (see §92.33).
- Defendant and the prosecution waive a preliminary hearing at the earliest possible time. See §§92.29–92.35 (taking defendant's waiver).
- The magistrate grants a continuance of the preliminary hearing for good cause. See §92.37 (determining good cause).

At the arraignment, the magistrate must issue subpoenas for witnesses within the state whose appearance at the preliminary hearing is required by either the prosecution or the defense. Pen C §859b.

Even when defendant has waived the 10-day time limit or the hearing has been continued for good cause, the hearing must be held within 60 calendar days from the arraignment or plea without an additional personal waiver by defendant. Pen C §859b; see §92.40. However, a defendant's motion to disqualify the magistrate for cause tolls the time limit for a preliminary hearing. See *People v Lind* (2014) 230 CA4th 709, 711, 178 CR3d 845.

b. Continuing Hearing for Good Cause

(1) [§92.37] Determining Good Cause

Continuing the hearing within the 10-day period requires neither notice nor good cause. See *People v Smith* (2016) 245 CA4th 869, 875, 199 CR3d 922 ("[E]ither party is presumptively entitled to a continuance, without having to provide notice or make a good cause showing . . . so long as the request and the requested date fall within the 10-day statutory deadline."). In general, good cause for delaying a preliminary hearing

beyond 10 court days is the same as good cause for delaying a trial under Pen C §1050. Pen C §859b. Good cause has been found when:

- The delay benefits defendant by preserving a constitutional or other right. *People v Kowalski* (1987) 196 CA3d 174, 179, 242 CR 32 (additional time for defendant to secure counsel). See *People v Snow* (2003) 30 C4th 43, 70, 132 CR2d 271 (court may not exercise its discretion over continuances so as to deprive defendant or counsel of reasonable opportunity to prepare).
- The delay is requested by and for the benefit of a codefendant. *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491. See *People v Clark* (2016) 63 C4th 522, 551–553, 203 CR3d 407 (codefendant needed to review discovery materials disclosed in connection with second amended complaint).
- A continuance is necessary because of defendant's conduct. *People v Johnson* (1980) 26 C3d 557, 570, 162 CR 431.
- A delay is necessary because of unforeseen circumstances, such as the unexpected illness or unavailability of counsel or subpoenaed witnesses. 26 C3d at 570. See *People v Alvarez* (1989) 208 CA3d 567, 577–578, 256 CR 289 (unavailability of prosecution's criminologist).
- Defendant is absent at the start of the preliminary hearing because of imprisonment on unrelated charges. *Blake v Superior Court* (1980) 108 CA3d 244, 247–250, 166 CR 470.
- Substituted defense counsel needs time to prepare for a complex preliminary hearing. *People v Kowalski*, *supra*, 196 CA3d at 179.
- A psychiatric evaluation to determine defendant's competence for self-representation cannot be obtained within the 10-day time limit. See *Curry v Superior Court* (1977) 75 CA3d 221, 225–226, 141 CR 884.

Penal Code §859b provides that the preliminary hearing may be continued for up to 3 court days in cases involving a violation of Pen C §11165.1 (sexual abuse) or Pen C §11165.6 (child abuse or neglect), when the prosecutor assigned to the case is unavailable because of another trial, preliminary hearing, or motion to suppress in progress.

(2) [§92.38] Release of Defendant When Good Cause Is Shown

When there is good cause for delaying the preliminary hearing and defendant has been in custody for 10 or more court days after the arraignment or plea solely on the complaint for which the preliminary

hearing is to be conducted, defendant must be released from custody on OR unless one of these exceptions applies (Pen C §859b; *People v Standish* (2006) 38 C4th 858, 869–870, 43 CR3d 785):

- Defendant has requested that the hearing be set beyond the 10-day period.
- Defendant is charged with a capital offense in a case in which the proof is evident and the presumption of guilt is great. See Simons, Preliminary Examinations §1.1.6 (factors).
- A necessary witness is unavailable because of defendant's actions.
- Defense counsel is ill.
- Counsel is unexpectedly engaged in a jury trial. This condition applies only to private defense counsel. See *People v Johnson* (1980) 26 C3d 557, 575, 162 CR 431.
- An unforeseen conflict of interest has arisen that requires the appointment of new counsel.

When OR release is granted under Pen C §859b, defendant must agree to be bound by reasonable conditions and to appear at future hearings as provided in Pen C §1318. Pen C §859b; *People v Standish*, *supra*, 38 C4th at 869, 871.

A defendant's remedy for a failure to release is to file a habeas corpus petition or other extraordinary writ just as a defendant may challenge the bail amount. Habeas corpus proceedings can be quickly resolved, and defendant may be released pending a decision. 38 C4th at 887.

The failure to release within the mandatory time frame is not an error of constitutional dimension that would generally justify the court in setting aside the information. The court may, however, set aside the information based on such an error if it determines that the error reasonably might have affected the preliminary hearing's outcome. 38 C4th at 882.

When a defendant has been granted OR release under Pen C §859b, the release applies to a limited period between the order granting a continuance and the conclusion of the preliminary hearing. OR may be revoked after defendant is held to answer or after the information is filed. 38 C4th at 883.

The limitations on OR release contained in Pen C §§1319 and 1319.5 (see §92.105) do not apply to Pen C §859b OR releases. 38 C4th at 870–871.

Codefendants. In-custody codefendants who object to the continuance of their preliminary hearing are nevertheless treated as having requested the continuance when the request is made by other codefendants with good cause. *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491. The

objection does not constitute a basis for releasing an in-custody codefendant who objects to the continuance. 31 CA4th at 992–993.

(3) [§92.39] No Good Cause

Absent exceptional circumstances and the 3-day statutory exception noted in §92.37, there is not good cause to continue the preliminary hearing when the prosecutor or the public defender are engaged in another proceeding. See *People v Johnson* (1980) 26 C3d 557, 575, 162 CR 431. Good cause is also not shown when:

- No judge is available to conduct the preliminary hearing. 26 C3d at 570–571 (not good cause absent exceptional circumstances).
- The case is set for a preliminary hearing beyond the 10-day time limit because of a clerical error by court personnel. *People v Pickens* (1981) 124 CA3d 800, 804–806, 177 CR 555.
- A witness who was not subpoenaed fails to appear. *Cunningham v Municipal Court* (1976) 62 CA3d 153, 155–156, 133 CR 18. See *Owens v Superior Court* (1980) 28 C3d 238, 251, 168 CR 466 (subpoena to missing witness was not enough when attempts by prosecution to locate the witness were "meager").
- The prosecutor is ill but a substitute prosecutor is available. *Kruse v Superior Court* (2008) 162 CA4th 1364, 1373–1374, 76 CR3d 664.

Failure to grant a continuance of a preliminary hearing is not error unless defendant can show that the failure resulted in the denial of a fair trial or otherwise affected the ultimate judgment. *People v Jenkins* (2000) 22 C4th 900, 958, 95 CR2d 377.

(4) [§92.40] No Continuance Beyond 60 Days Without Personal Waiver

If the magistrate finds that the prosecution has established good cause, the magistrate may extend the time for the preliminary hearing beyond the 10-day time limit. Pen C §859b. The magistrate may not, however, extend the time for the preliminary hearing beyond 60 calendar days from the date defendant was arraigned or entered a plea without defendant's personal waiver. Pen C §859b.

There is no good cause exception to the 60-day rule. Defendant's personal waiver is required, even if the prosecutor can establish good cause as to the defendant or codefendant. *Ramos v Superior Court* (2007) 146 CA4th 719, 729–732, 53 CR3d 189. A defendant's personal waiver of a preliminary hearing within 60 days cannot be prospective. *People v*

Figueroa (2017) 11 CA5th 665, 684–685, 218 CR3d 104 (defendant's pre-plea waiver ineffective because right did not accrue until plea entered).

c. [§92.41] Obtaining Time Waivers

Personal waiver. The magistrate must take defendant's personal waiver of the 10-day time limit for starting the preliminary hearing. Pen C §859b(a); *People v Kowalski* (1987) 196 CA3d 174, 178, 242 CR 32. See also *People v Love* (2005) 132 CA4th 276, 34 CR3d 6 (if defendant asserts right to preliminary hearing within 10-day limit, fails to appear, and is later arrested on a bench warrant, defendant may not demand a hearing within 10-day limit again. Some judges set new preliminary hearing within 10 days but may continue matter for good cause).

Defense counsel may not effectively stipulate to a waiver for the defendant. See Pen C §859b(a); Simons, Preliminary Examinations §1.1.5.

☛ JUDICIAL TIP: Sometimes attorneys will attempt to answer for defendant in agreeing to time waivers. Judges should require defendant to answer on the record.

Application of 60-day time limit. A waiver of the right to a preliminary hearing within 10 days waives the right to have it held at the earliest possible time. Pen C §859b; *People v Alvarez* (1989) 208 CA3d 567, 573–574, 256 CR 289. The applicable time limit then becomes the 60-calendar-day time limit of Pen C §859b(b). When a defendant has waived the right to a preliminary hearing within the 10-day time limit, the court is not required to take an additional waiver from defendant if the hearing is continued again within the 60 calendar days. All that is required is that the hearing must be conducted within the 60-day time limit. 208 CA3d at 572–573.

☛ JUDICIAL TIP: A good practice is to obtain a new waiver from defendant if defendant gives only a limited waiver to a specific date and the hearing is to be continued to a later date within the 60-day time limit. Though a waiver may not be required for a continuance after defendant waives the 10-day period, good cause under Pen C §1050(b) must be shown. *People v Alvarez* (1989) 208 CA3d 567, 577, 256 CR 289.

The preliminary hearing may be held beyond the 60-day time limit only if the magistrate takes defendant's personal waiver. Pen C §859b. See Simons, Preliminary Examinations §1.1.11.

☛ JUDICIAL TIP: Many judges at the arraignment and at later appearances routinely request 10-court-day and 60-calendar-day waivers. Some defendants waive the shorter period only.

d. [§92.42] Consequences of Untimely Hearing

In-custody defendants—10-day limit. The magistrate must dismiss the complaint if the preliminary hearing is set or continued beyond 10 court days from the arraignment or plea, whichever is later, and defendant has remained in custody for 10 or more days solely on that complaint, unless defendant has waived the right to a hearing within the 10-day period or good cause exists. Pen C §859b; *People v Pickens* (1981) 124 CA3d 800, 806, 177 CR 555. Defendant need not show prejudice on a Pen C §995 motion challenging this type of error by the court. 124 CA3d at 806. A defendant who was in custody at the arraignment, but who is released from custody in less than 10 court days, is not entitled to a dismissal if the preliminary hearing is not held within the 10-day period. See Simons, Preliminary Examinations §1.1.15.

Custody based solely on that complaint has been defined as custody "for reasons solely attributable to the charges to be adjudicated at the preliminary examination." *People v Standish* (2006) 38 C4th 858, 866 n2, 43 CR3d 785. See the judicial tip at §92.3 for handling cases of defendants in custody for the current charge and violation of court probation, formal felony probation, or parole, and the flowchart in the Appendix.

Out-of-custody defendants—10-day limit. Violation of the 10-court-day rule affecting out-of-custody defendants does not result in dismissal unless defendant shows actual prejudice from the delay. *People v Luu* (1989) 209 CA3d 1399, 1404–1407, 258 CR 10 (court should make every effort to give out-of-custody defendants hearing within 10-day limit).

All defendants—60-day limit. The magistrate must dismiss the complaint if the preliminary hearing is not held within 60 calendar days from the arraignment or plea, whichever is later, unless defendant personally waives a preliminary hearing within 60 days. Pen C §859b. This applies whether or not defendant is in custody and whether or not good cause exists. Pen C §859b. When good cause exists, but the complaint is dismissed under the 60-day rule, the dismissal does not count as one of the two dismissals permitted under Pen C §1387. An additional filing of charges is permitted under Pen C §1387.1. See §92.95.

If the magistrate sets the preliminary hearing beyond the time limits in Pen C §859b or continues it without good cause, the prosecution or the defense may file a petition for a writ of mandate or prohibition in the superior court seeking immediate appellate review. Pen C §871.6.

5. [§92.43] Defendant's Presence at Preliminary Hearing

In general, defendant must be personally present at the preliminary hearing. Pen C §§977(b)(1), 1043.5(a). The defendant's presence is

required, in part, so that defendant may be identified in court as the perpetrator. See *People v Green* (1979) 95 CA3d 991, 1003, 157 CR 520.

In a noncapital case, the magistrate may proceed with the preliminary hearing if defendant becomes voluntarily absent after the hearing has started in defendant's presence. Pen C §1043.5(b)(2). See §92.44 (disruptive defendant must be removed from courtroom).

☛ JUDICIAL TIP: When a defendant, present at the outset of the preliminary hearing, later does not appear, and the magistrate proceeds with the hearing on the assumption that defendant has become voluntarily absent, defendant may later prevail on a Pen C §995 motion and invalidate the holding order. If defendant establishes that the absence was involuntary and the magistrate had no sufficient factual basis to find otherwise, the information will be set aside. To avoid this problem, some courts continue the preliminary hearing and issue a bench warrant under Pen C §978.5 to secure defendant's physical presence before resuming the hearing. See *People v Gutierrez* (2003) 29 C4th 1196, 1206–1209, 130 CR2d 917 (judge properly continued with trial in defendant's absence without waiver when defendant unequivocally stated to defense counsel in reporter's and bailiff's presence that he did not want to attend trial and would not leave lockup).

See Simons, Preliminary Examinations §2.4.4.

6. [§92.44] Handling the Disruptive Defendant

A disruptive defendant, *i.e.*, a defendant who engages in conduct that is so disorderly, disruptive, and disrespectful of the court that the preliminary hearing cannot be carried on with defendant present, may be removed from the courtroom. Pen C §1043.5(b)(1). The magistrate must first warn defendant that continued disruptive behavior may lead to removal. Pen C §1043.5(b)(1). A removed defendant may return to the courtroom when willing to act with decorum and respect. Pen C §1043.5(c). See *People v Sully* (1991) 53 C3d 1195, 1239–1240, 283 CR 144; *King v Superior Court* (2003) 107 CA4th 929, 132 CR2d 585.

☛ JUDICIAL TIP: A pro per defendant who becomes disruptive may not be removed, as that would leave no one to assert defendant's rights in the continuing proceedings. *People v Carroll* (1983) 140 CA3d 135, 141–144, 189 CR 327. Appropriate alternative means of dealing with a pro per defendant's disruptive behavior include citing defendant for contempt, restraining defendant, or appointing counsel before removing defendant. 140 CA3d at 142. Some judges suggest appointing standby counsel for a disruptive

pro per defendant. See, *e.g., People v El* (2002) 102 CA4th 1047, 1049–1051, 126 CR2d 88 (error for court to proceed in disruptive defendant's absence when standby counsel is available; however, error harmless when defendant left unrepresented only briefly).

A defendant should not be shackled, handcuffed, or otherwise physically restrained at the preliminary hearing absent good cause based on a showing of defendant's violence, threat of violence, or other nonconforming behavior. *People v Fierro* (1991) 1 C4th 173, 219, 3 CR2d 426, disapproved on other grounds in 50 C4th 99, 206–207. See Pen C §688 (no person charged with public offense may be subjected, before conviction, to any more restraint than is necessary for detention to answer the charge); *People v Seaton* (2001) 26 C4th 598, 652, 110 CR2d 441 (defendant being charged with violent crime does not establish sufficient threat of violence or disruption to justify physical restraints, nor does courthouse layout, *e.g.,* courtroom's proximity to exit, establish individualized suspicion that defendant will engage in nonconforming conduct); *People v Cunningham* (2001) 25 C4th 926, 986, 988, 108 CR2d 291 (defendant's record of violence, or case being capital, does not, by itself, justify shackling; shackling warranted because of evidence defendant might attempt to escape from assigned courtroom without a lock); *People v Livaditis* (1992) 2 C4th 759, 774–775, 9 CR2d 72 (victim's unwillingness to testify in defendant's presence unless he was handcuffed justified the restraint, as did defendant's abuse of victim and defendant's history of escape attempts). See also *People v Mar* (2002) 28 C4th 1201, 124 CR2d 161 (factors considered in using stun belt). A general policy of shackling defendants is unlawful. *Solomon v Superior Court* (1981) 122 CA3d 532, 536, 177 CR 1.

Because the dangers of unwarranted shackling at the preliminary hearing are not as substantial as at trial, a lesser showing for preliminary hearing shackling is appropriate. *Small v Superior Court* (2000) 79 CA4th 1000, 1016, 94 CR2d 550. It is an abuse of discretion for the judge to order defendant's hands completely unrestrained at the preliminary hearing, when a sufficient showing is made that defendant poses a security risk in the courtroom, *e.g.,* defendant has a documented history of violence while in custody, and has shown an ability to craft everyday items into dangerous weapons and to hide them in his body cavities. 79 CA4th at 1015–1018 (justifications for shackling in court are not restricted to defendant's previous attempts to disrupt courtroom proceedings or to escape; appellate court approved judge's order that resulted in defendant's right hand being secured with 10-inch extension chain to waist chain to enable him to take notes).

Evidence of defendant's behavior that leads the magistrate to conclude that defendant should be physically restrained must appear on the record. It is an abuse of discretion to impose physical restraints without a showing on the record of violence or a threat of violence or other nonconforming conduct. *People v Seaton*, *supra*, 26 C4th at 651.

The magistrate may not delegate the decision to shackle to law enforcement. 26 C4th at 651.

☛ JUDICIAL TIP: Restraining a defendant is rarely necessary. It should not be done on the court's own initiative. Defendant and defense counsel should first be given full opportunity to be heard. When in doubt, the better practice is not to shackle or restrain.

7. Complying With One-Session Requirement

a. [§92.45] Conducting Hearing in One Session

In general. A magistrate must complete the preliminary hearing in one session unless defendant personally waives the right to a continuous hearing (see §92.46) or the magistrate postpones it for good cause shown in an affidavit or declaration. Pen C §861(a). The statute's one-session requirement does not mean the preliminary hearing must be completed in a day. *Stroud v Superior Court* (2000) 23 C4th 952, 965, 98 CR2d 677. A session is an actual sitting of the court continued by adjournments in ordinary course from day to day, or over Sundays and holidays, but not interrupted by an adjournment to a distant day. 23 C4th at 965. The latter is a postponement, which is different from a temporary cessation or interruption to allow for the participants' comfort or to observe a legal holiday. 23 C4th at 965. If, at the outset of the preliminary hearing, it appears that there is a reasonable possibility that outside demands might conflict with the uninterrupted completion of the hearing, it is prudent and preferable for the magistrate to take immediate steps to determine whether the case should be reassigned so that the hearing can be completed in a single session. 23 C4th at 973 n13.

Good cause for postponement. The statute does not define what constitutes good cause for a postponement. 23 C4th at 969. But numerous judicial decisions indicate that good cause for postponement is not shown by counsel's unpreparedness to proceed, the unavailability of a judge to preside over the proceeding, or the unavailability of a courtroom. 23 C4th at 969. Scheduling conflicts arising from exceptional circumstances, *i.e.,* unique and nonrecurring events, may sometimes justify a brief postponement. 23 C4th at 970.

Time limits on postponement. If the magistrate postpones the hearing on a showing of good cause for more than 10 days, defendant must be released from custody under Pen C §859b. Pen C §861(a)(2). The postponement may not exceed 60 days from the date the motion is granted unless defendant consents. Pen C §861(b).

A magistrate may postpone a preliminary hearing for 1 court day to accommodate the special physical, mental, or emotional needs of a child witness 10 years old or younger, or a dependent person. Pen C §861.5. Dependent person means any person who has a physical or mental impairment that substantially restricts the ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. Dependent person also includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Pen C §288(f)(3). In such event, the magistrate must admonish both parties against coaching the witness before the next appearance at the preliminary hearing. Pen C §861.5. See Simons, Preliminary Examinations §6.3.1 (postponing hearing for other witnesses).

Postponement for court matters. A magistrate may interrupt a preliminary hearing for brief court matters, as long as a substantial majority of the court's time is devoted to the preliminary hearing. Pen C §861(c). A recess for 1 day for the magistrate to attend a scheduled Judicial Council task force meeting on drug courts did not come within this exception to the one-session rule and was not good cause for the postponement. *Stroud v Superior Court*, *supra*, 23 C4th at 971 (Judicial Council business or other educational, organizational or community obligation not good cause in and of itself, but may be good cause when considered with unanticipated length of hearing, prior commitment and lack of other options).

See Simons, Preliminary Examinations §§1.2.1–1.2.8 (one-session rule). See also §92.113 (script for a one-session waiver).

b. [§92.46] Waiver of One-Session Requirement

Defendant must personally waive the right to a continuous preliminary hearing. Counsel's waiver is ineffective. Pen C §861(a)(1). Defendant's waiver should be put on the record. Defendant's request for a continuance of the preliminary hearing to file a motion to suppress under Pen C §1538.5(f)(2) is considered a personal waiver a continuous preliminary hearing. Pen C §861(d).

A magistrate does not need to obtain a waiver from defendant to attend briefly to other court matters. Interruptions may be appropriate in

many situations. See §92.45. Many judges, however, routinely request a one-session waiver from defendant if there is any uncertainty as to how long a particular interruption may last.

A defendant does not waive the one-session requirement for all purposes by consenting to early adjournments on specified days for the convenience of counsel. *Stroud v Superior Court* (2000) 23 C4th 952, 965, 967, 98 CR2d 677. Moreover, when a defendant waives a continuous preliminary hearing under Pen C §861, agreeing that the hearing is to be resumed at a specific future date, the waiver does not permit the delay to extend beyond that date. *Kruse v Superior Court* (2008) 162 CA4th 1364, 1372–1373, 76 CR3d 664.

See Simons, Preliminary Examinations §1.2.9. See also §92.113 (script for a one-session waiver).

c. [§92.47] Consequences of Violating One-Session Requirement

The complaint must be dismissed if the preliminary hearing is not completed in one session and defendant has not waived a continuous preliminary hearing. Pen C §861. An alleged violation of the one-session requirement is usually raised by a Pen C §995 motion. To have the complaint dismissed, defendant must show that good cause for violating the requirement was not established; defendant need not show prejudice. See *People v Bucher* (1959) 175 CA2d 343, 346, 346 P2d 202.

8. [§92.48] Advising Defendant of Charges

Two early decisions interpret Pen C §864 as requiring a reading of the complaint at the beginning of the preliminary hearing to inform defendant of the charges. *People v Miller* (1918) 177 C 404, 407, 170 P 817; *In re Williams* (1921) 52 CA 566, 568, 199 P 347. Normally, the magistrate asks for and receives from defense counsel a waiver of the reading of the complaint. This waiver should be put on the record.

☛ JUDICIAL TIP: For pro per defendants, and in all capital cases, many judges read the complaint even if defendant offers to waive the reading. See §92.4(7) (summarizing the complaint).

9. [§92.49] Reporting Preliminary Hearing

A defendant has a right to a free preliminary hearing transcript. Pen C §§869(f), 870. A preliminary hearing transcript is required in a homicide case, and must be made in all other cases on either party's request. Pen C §869. See Pen C §190.9 (all proceedings reported in death penalty cases).

As a matter of practice, preliminary hearings are always reported, even without a request. See Simons, Preliminary Examinations §2.2.7.

If defendant is held to answer, the reporter must deliver the transcript to the court clerk within 10 days of the hearing's close. Pen C §869(e). Late filing does not require dismissal. *People v Ladmirault* (1989) 214 CA3d 900, 903, 263 CR 285.

B. [§92.50] Excluding Witnesses

At any time after the preliminary hearing starts, either party may ask the magistrate to exclude all potential and actual witnesses who have not been examined. Pen C §867. The magistrate must do so, and must also order the witnesses not to talk to each other until they have all been examined. If feasible, the magistrate may order the witnesses to be kept separate from each other until they are all examined. Pen C §867. Either party may challenge the exclusion of any person by requesting a hearing to determine if that person properly may be excluded. Pen C §867.

The exclusion of witnesses is designed to prevent collusive or false testimony. *Perry v Leeke* (1989) 488 US 272, 281 n4, 109 S Ct 594, 102 L Ed 2d 624; *People v Valdez* (1986) 177 CA3d 680, 687, 223 CR 149. If the person to be excluded is an actual or potential witness, the magistrate may not deny the motion. *People v Young* (1985) 175 CA3d 537, 541, 221 CR 32; see §92.52. However, to be subject to exclusion, the person must be an actual or potential witness at the preliminary hearing, not merely at the trial or another proceeding. Pen C §867.

An order excluding witnesses does not apply to investigators for the parties or to any officer having custody of witnesses. Pen C §867.

1. [§92.51] Procedure for Implementing Exclusion Order

A motion to exclude witnesses under Pen C §867 must be granted when requested by either side. Frequently, some witnesses subject to the order will be in the courtroom; some will be outside in adjacent areas, while others will arrive during the hearing. The magistrate, after announcing the order and forbidding communication, will usually advise the attorneys to contact the witnesses they know, both in and out of the courtroom, and advise them of the order. The bailiff normally places a prominent sign on the courtroom's outside door notifying witnesses not to enter and not to communicate with each other. The bailiff may also ask if each person entering the courtroom is a witness, and, if so, direct the person to wait outside the courtroom. In most situations, these procedures effectively implement a witness exclusion order.

2. [§92.52] Distinguishing Actual and Potential Witnesses

Most judges rely on the attorneys to determine who is an actual or potential witness subject to the exclusion order. The attorneys are in the best position to identify witnesses.

The usual practice is to issue an order in response to a motion to exclude and to wait for an objection before requesting an offer of proof from the moving party. If the offer of proof establishes that a particular person will be called as a witness in the preliminary hearing, the exclusion order stands. Some judges demand an offer of proof from the moving party and invite objection from the other side before issuing the order. To do this routinely in every case, however, would consume time unnecessarily.

☛ JUDICIAL TIP: A challenge to the exclusion of a potential witness is more difficult to resolve without guidance from statutory or case law. Some judges employ the standard of reasonable possibility that a person may be called to testify at the hearing. Other judges use the standard of reasonable probability.

If either side moves to challenge the witness-exclusion order, the magistrate must hold a hearing on the record to determine if the person sought to be excluded is, in fact, excludable. Pen C §867. See Simons, Preliminary Examinations §3.1.2.

☛ JUDICIAL TIP: Some judges resolve exclusion problems by calling the witnesses subject to dispute first. After being examined and excused, they are as free to attend the hearing as any other member of the public. Pen C §867; see *People v Disandra* (1987) 193 CA3d 1354, 1359, 239 CR 9.

3. [§92.53] Effect of Violating Exclusion Order

A judge may hold a witness in contempt for violating an exclusion order. See CCP §1209(a)(5); *People v Duane* (1942) 21 C2d 71, 80, 130 P2d 123. An attorney who participates in violating the order is also subject to contempt. *People v Valdez* (1986) 177 CA3d 680, 691, 223 CR 149; *People v Young* (1985) 175 CA3d 537, 542, 221 CR 32.

The judge may exclude the witness's testimony, but only if the party seeking to offer the testimony was at fault in causing the witness's violation. See *People v Adams* (1993) 19 CA4th 412, 436, 23 CR2d 512; *People v Valdez, supra,* 177 CA3d at 686–696.

☛ JUDICIAL TIP: Many judges believe attorneys should ensure that their witnesses comply with an exclusion order. Some judges fine an attorney whose witnesses violate the order.

See Simons, Preliminary Examinations §3.1.5.

C. Excluding the Public

1. Defendant's Motion To Close Hearing (Pen C §868)

a. [§92.54] Standard for Closing Hearing

Generally, a preliminary hearing must be open to the public. Under Pen C §868, a defendant may move to close the hearing and exclude the public to protect the right to a fair and impartial trial. A magistrate may grant a motion under Pen C §868 only after specifically finding that:

- There is a substantial probability that defendant's fair trial right would be prejudiced by publicity that closing the hearing would prevent (Pen C §868); and
- Reasonable alternatives to closing the hearing would not adequately protect defendant's fair trial right (*Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 13–14, 106 S Ct 2735, 92 L Ed 2d 1).

If the magistrate grants the motion, the magistrate must exclude everyone except defendant, defense counsel, the prosecutor, the investigating officers for both parties, a person present to give a prosecution witness moral support under Pen C §868 or Pen C §868.5 (see §§92.58, 92.62), and necessary court personnel such as the clerk, court reporter, and bailiff. Pen C §868. Members of the victim's family may remain. See §92.57. A magistrate's failure to remove all persons but those allowed to be present under Pen C §868 renders the commitment legally defective. *Ortega v Superior Court* (1982) 135 CA3d 244, 251, 185 CR 297. The defendant may challenge this error by a Pen C §995 motion.

See Simons, Preliminary Examinations §§3.2.11–3.2.12 (motion for gag order or for an order sealing documentary or physical evidence made in conjunction with closed hearing motion).

See Cal Rules of Ct 1.150, Simons, Preliminary Examinations §§3.2.9–3.2.10 (request for media coverage of preliminary hearing).

b. [§92.55] Alternatives to Closing Hearing

The Supreme Court has recognized the potential tainting of a prospective jury pool arising from press coverage of the preliminary hearing. See *Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 14, 106 S Ct 2735, 92 L Ed 2d 1. Although various alternatives to closing the hearing have been suggested, most can be implemented only near to, or at the time of, trial, *e.g.,* by (*Tribune Newspapers West, Inc. v Superior Court* (1985) 172 CA3d 443, 446, 218 CR 505):

- Changing venue.
- Postponing the trial if defendant waives time.

- Performing a thorough voir dire.
- Issuing clear instructions regarding press coverage.
- Sequestering the jury.
- Busing untainted jurors from another part of the county.
- Excluding the public from sensitive parts of the hearing.

These steps may make feasible the selection of an unbiased jury in spite of the pretrial publicity arising from an open preliminary hearing. They should be considered in determining whether to close the hearing.

☛ JUDICIAL TIP: Closing a preliminary hearing and sealing the transcript should be used with caution and only in extraordinary cases. In cases that attract media attention, this action (see *Cromer v Superior Court* (1980) 109 CA3d 728, 732, 167 CR 671) may be the last resort to preserve the right to an impartial jury.

c. [§92.56] Requirement That Press Be Notified

Under the first amendment, the press and the public have the fundamental right to be present at criminal proceedings. When a defendant makes a motion to close the preliminary hearing under Pen C §868, the media, including the press, are interested parties to the motion and must receive notice. See *Tribune Newspapers West, Inc. v Superior Court* (1985) 172 CA3d 443, 453–454, 218 CR 505.

Although no notification procedures are specified, the court, under its inherent power and under CCP §187, may adopt its own reasonable measures. *Telegram-Tribune, Inc. v Municipal Court* (1985) 166 CA3d 1072, 1074, 213 CR 7.

A magistrate should check with the presiding judge to determine if any arrangement has been established or followed by the court for contacting the press when motions to close are made.

What constitutes reasonable notice to the press was not established by the court in *Tribune Newspapers West, Inc., supra,* in which two-and-a-half-hours' notice was held to be clearly insufficient. Sufficient advance notice so that the press can contact legal counsel and arrange for representation at the hearing on the motion should guide the court in determining reasonable notice.

If confidential matters will be presented to the court on an opposed motion, the magistrate may conduct a bifurcated hearing: the defendant's nonconfidential evidence for closing the hearing and any opposition is offered in public, and an in camera hearing is then held for the presentation of defendant's confidential evidence and for defendant's response to any questions posed by the press or the public. The court

should retain a record of the entire proceeding, both public and in camera, for later review. *Telegram-Tribune, Inc. v Municipal Court, supra*, 166 CA3d at 1074. If defendant moves to seal documentary or physical evidence in the file, the magistrate should employ the standard for closing the hearing in deciding the motion. *Associated Press v U.S. Dist. Court* (9th Cir 1983) 705 F2d 1143, 1145–1147; see §92.54 and Simons, Preliminary Examinations §§3.2.1–3.2.7.

In a high-profile case, judges may call in the attorneys several days before the preliminary hearing, either prior to or as part of the prehearing conference. The judge states the procedures for notifying the press and the applicable time limits if defendant intends to move to close the hearing.

d. [§92.57] Admitting Alleged Victim's Family

If the preliminary hearing is closed, the prosecutor may make a motion to allow the victim's family into the courtroom. Pen C §868. The magistrate must grant the prosecutor's motion unless the magistrate finds that (Pen C §868):

- Exclusion is necessary to protect defendant's right to a fair and impartial trial, or
- The presence of the victim's family poses a risk of affecting the content of the victim's testimony or that of any other witness.

The family includes a spouse, parents, legal guardian, children, and siblings. The magistrate must admonish family members in attendance not to discuss any testimony with anyone. Pen C §868.

e. [§92.58] Admitting Moral Support Person for Prosecuting Witness

A prosecuting witness may have a chosen person present for moral support at a closed preliminary hearing during the witness's testimony, as long as this person is not a witness. Pen C §868. For purposes of Pen C §868, prosecuting witness means all the prosecution's witnesses, not just the victim. *Ortega v Superior Court* (1982) 135 CA3d 244, 252, 185 CR 297. A magistrate may not reject the witness's choice of a support person. 135 CA3d at 253–254. If the support person requires an interpreter, that person may also be admitted to the hearing. 135 CA3d at 254.

See Simons, Preliminary Examinations §§3.2.14–3.2.15.

2. Prosecutor's Motion To Close Hearing for Specific Witnesses

a. [§92.59] Motion To Close Hearing During Examination of Witness Who Is Minor or Dependent Person Victim of Sex Offense; Other At-Risk Witnesses (Pen C §868.7)

On a prosecution motion under Pen C §868.7, the magistrate may close the preliminary hearing during the testimony of (Pen C §868.7(a)):

- A minor or a dependent person with a substantial cognitive impairment who is the complaining victim of a sex offense, if it is determined that testimony before the public would be likely to cause serious psychological harm to the witness and there are no alternative procedures that can be employed short of closing the hearing, such as a video recorded deposition of the witness or a hearing conducted at another location and transmitted via closed circuit television to the court. Dependent person means any person who has a physical or mental impairment that substantially restricts the ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. Dependent person also includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Pen C §288(f)(3).
- A witness whose life would be subject to substantial risk in appearing before the public if it is determined that there are no alternative security measures that can be taken short of closing the hearing, such as concealing the witness's features or physical description, careful search of members of the public when entering the courtroom, or the temporary exclusion of other actual or potential witnesses.

The case must be dismissed on defendant's motion under Pen C §995 if the court fails to consider whether alternative measures to closing the hearing exist. *Eversole v Superior Court* (1983) 148 CA3d 188, 200–202, 195 CR 816.

When public access to the preliminary hearing is restricted, a transcript of the testimony must be made available to the public as soon as practicable. Pen C §868.7(b).

The fundamental right of the press and the public to be present at criminal proceedings flows from the first amendment. When that right is restricted, the magistrate must make findings showing both the necessity

of the restriction in light of a compelling governmental interest and also a narrow tailoring to serve that interest. See *People v Baldwin* (2006) 142 CA4th 1416, 1421–1423, 48 CR3d 792; *Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 21, 106 S Ct 2735, 92 L Ed 2d 1. The welfare of a minor victim, and probably also the physical protection of a witness, are compelling state interests.

Factors to be weighed in protecting the welfare of a minor victim include (*Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 608, 102 S Ct 2613, 73 L Ed 2d 248):

- The minor's age,
- The minor's psychological maturity and understanding,
- The nature of the crime,
- The victim's wishes, and
- The interests of the minor's parents and relatives.

See Simons, Preliminary Examinations §§6.2.1–6.2.7 (limits on use of closed-circuit testimony).

☛ JUDICIAL TIP: In light of the authorization in Pen C §872(b) to use hearsay testimony in preliminary hearings, an alternative to closing the hearing is using a qualified law enforcement officer to present the complaining victim's testimony. See §92.65.

See Simons, Preliminary Examinations §§3.4.1–3.4.7.

b. [§92.60] Motion To Close Hearing To Protect Reputation of Minor or Dependent Person Victim of Sex Offense (Pen C §859.1)

On the prosecutor's motion in any criminal proceeding in which defendant is charged with a sex offense against a minor under 16 years of age or a dependent person with a substantial cognitive impairment, the magistrate must hold a hearing to determine whether the testimony of, or about, the minor should be closed to the public to protect the minor's or dependent person's reputation. Pen C §859.1(a). Dependent person means any person who has a physical or mental impairment that substantially restricts the ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. Dependent person also includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Pen C §288(f)(3).

Under Pen C §872(b), it is likely that the testimony relating to a sex offense against a minor or dependent person victim subject to the

protection of this statute will be offered by a qualified law enforcement officer rather than the victim. See §92.65. The protection afforded by Pen C §859.1 continues to apply because that protection also extends to the minor's or dependent person's reputation.

In making the determination required by Pen C §859.1, the magistrate must consider (Pen C §859.1(b)):

- The nature and seriousness of the offense;
- The minor's age or the dependent person's level of cognitive development;
- The extent to which the community size would preclude preserving the victim's anonymity;
- The likelihood of public opprobrium because of the victim's status;
- The existence of an overriding public interest in having an open hearing;
- Whether the prosecution has shown a substantial probability that the victim's identity would otherwise be disclosed to the public and that this disclosure would cause serious harm to the victim;
- Whether the victim has disclosed information about the case to the public through press conferences, public meetings, or other means; and
- Other facts the magistrate considers necessary to protect the interests of justice.

See also discussion of *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 102 S Ct 2613, 73 L Ed 2d 248, in §92.59.

The prosecution may also apply for an order that the testimony at the preliminary hearing of a victim 15 years old or younger or who is developmentally disabled as a result of an intellectual disability be video recorded. Pen C §1346(a). A written application must be served at least 3 days before the hearing. Pen C §1346(b). On timely receipt of the application, the magistrate must issue the order. Pen C §1346(c). The video recording must be made available to the prosecution and the defense, and is subject to a protective order to protect the victim's privacy. Pen C §1346(e)–(f). Video recording the victim's testimony does not preclude a request by the prosecution to close the hearing under Pen C §868.7 (see §92.59). Pen C §1346(e). See Simons, Preliminary Examinations §§6.1.1–6.1.3.

See Simons, Preliminary Examinations §§3.5.1–3.5.4 (further discussion of Pen C §859.1 motions).

3. [§92.61] Removal of Spectator Intimidating Witness

The court may order the removal of any spectator who is intimidating a witness if, after a hearing, the court finds based on clear and convincing evidence that (Pen C §686.2(b)):

- The spectator is actually intimidating the witness;
- The witness will be unable to give full, free, and complete testimony if the spectator is not removed; and
- Removal of the spectator is the only reasonable means of ensuring that the witness may give full, free, and complete testimony.

The court may not remove the press or defendant under this provision. Pen C §686.2(c).

The court may exclude individuals who are disrupting the proceedings using its general authority to preserve order under CCP §177.

D. [§92.62] Support Persons for Prosecution Witnesses in Cases Involving Violent Felonies

Right to support person(s). A prosecuting witness in a case involving a violent felony listed in Pen C §868.5(a) may choose two people to be present for moral support during the witness's preliminary hearing testimony. Pen C §868.5(a). For purposes of Pen C §868.5, the prosecuting witness means all the prosecution's witnesses, not just the victim. *People v Kabonic* (1986) 177 CA3d 487, 493, 223 CR 41. A therapy dog is not a person under this statute. *People v Spence* (2012) 212 CA4th 478, 516–517, 151 CR3d 374.

On defendant's request, the magistrate must hold an evidentiary hearing to determine the necessity for the support persons. *People v Adams* (1993) 19 CA4th 412, 443–444, 23 CR2d 512 (upholding constitutionality of Pen C §868.5). A defendant who fails to object to a support person's presence during the hearing may not raise the issue on appeal. *People v Lord* (1994) 30 CA4th 1718, 1721–1722, 36 CR2d 453.

More than one support person. Only one support person may accompany the witness to the stand, although the other may be present in the courtroom during the witness's testimony. Pen C §868.5(a).

Support person-witness. One of the support persons may also be a witness. In that case, the prosecutor must show that the person is desired by and will be helpful to the prosecuting witness. Pen C §868.5(b). The magistrate must then permit this person to be present as a support person unless defendant shows, or the magistrate otherwise determines, that the person's presence poses a substantial risk of influencing the prosecuting witness's testimony. The magistrate must admonish the support person not

to prompt, sway, or influence the witness, and may remove a support person who violates the admonition. Pen C §868.5(b).

The court must take the testimony of a support person-witness before the testimony of the prosecution witness, who must be excluded during the support person's testimony. Pen C §868.5(c). The magistrate should allow the support person to be recalled for further testimony if the prosecution, in good faith, fails to discover evidence about which the support person has knowledge until after the support person and the witness have testified. *People v Redondo* (1988) 203 CA3d 647, 653, 250 CR 46.

Minor's mother as support person. In a prosecution for sex crimes on a minor, the minor's mother may serve in the capacity of a support person while the minor is testifying. *People v Johns* (1997) 56 CA4th 550, 553–556, 65 CR2d 434.

Media support person. No support person may be associated with a news publication (see Evid C §1070(a)) unless the person is the witness's parent, guardian, or sibling. A support person who is associated with a news publication may not make notes of the proceeding. Pen C §868.5(a).

E. [§92.63] Precautions for Disabled or Minor Victims of Designated Sex Offenses

In any criminal proceeding in which a defendant is charged with a sexual offense committed on a minor under 11 years of age or on a person with a disability (see Govt C §12926(j)—mental disability defined), the magistrate must take special precautions to comfort and support such person and to protect him or her from coercion, intimidation, or undue influence as a witness. Pen C §868.8. These special precautions may include (Pen C §868.8):

- Allowing the disabled person or minor relief periods out of the courtroom during testimony.
- Removing the magistrate's judicial robe if he or she believes it may intimidate the disabled person or minor.
- Relocating the magistrate, court personnel, parties, witnesses, and any support persons within the courtroom to facilitate a more comfortable and personal environment for the disabled person or minor.
- Limiting the hours of the disabled person's or minor's testimony to normal school hours.

See Simons, Preliminary Examinations §§6.4.1–6.4.5.

F. Determining Admissibility of Evidence at Preliminary Hearing

1. [§92.64] Exceptions to General Rules of Evidence

In general, only competent evidence that is otherwise admissible under the Evidence Code may be introduced at the preliminary hearing. See *Lozoya v Superior Court* (1987) 189 CA3d 1332, 1338, 235 CR 77. Exceptions include:

- Qualified law enforcement officers may testify to hearsay declarations at the hearing. See Pen C §872(b); §92.65.
- Evidence Code §1203, which provides that a hearsay declarant may be called by the adverse party as if under cross-examination, does not apply if the statement is offered at the preliminary hearing by a qualified law enforcement officer. See Evid C §1203.1; §92.68.
- Persons 13 years old and younger, or persons with disabilities, may be examined or cross-examined by closed-circuit television. See Pen C §§1347(b), 1347.5. A judge may not permit the adult victim in a criminal sexual abuse case to testify behind one-way glass that prevents the victim from seeing defendant while testifying, as it violates the right of confrontation. *People v Murphy* (2003) 107 CA4th 1150, 1155–1158, 132 CR2d 688.
- Proof of a writing's content by otherwise admissible original or secondary evidence is allowed, and the rules under Evid C §§1520–1523 do not apply. Pen C §872.5.

Only relevant evidence is admissible at the preliminary hearing. Evidence that does not tend to prove or disprove facts showing that an offense has been committed or that defendant committed it is not admissible. *People v Williams* (1989) 213 CA3d 1186, 1196, 262 CR 303; see §92.67. A party must object at the time seemingly inadmissible evidence is introduced, or any objection is waived. *People v Fisher* (1972) 27 CA3d 928, 932, 104 CR 289.

2. Hearsay Testimony Under Pen C §872(b)

a. [§92.65] Hearsay Testimony by Experienced Law Enforcement Officer

The preliminary hearing testimony is often limited to that of the investigating officer or other law enforcement personnel, who, if qualified, may properly offer hearsay evidence to establish probable cause. *People v DeJesus* (1995) 38 CA4th 1, 15, 44 CR2d 796.

Probable cause may be based, in whole or in part, on the sworn testimony of a law enforcement officer or honorably retired law enforcement officer relating declarants' out-of-court statements offered for

the truth of the matter asserted. Cal Const art I, §30(b); Pen C §872(b); *People v Miranda* (2000) 23 C4th 340, 347–349, 96 CR2d 758; *Whitman v Superior Court* (1991) 54 C3d 1063, 1072–1073, 2 CR2d 160. See also *Peterson v State of California* (2010) 604 F3d 1166, 1168.

An honorably retired law enforcement officer may only relate declarants' out-of-court statements offered for the truth of the matter asserted and that were made when the officer was an active law enforcement officer. Any law enforcement officer or honorably retired law enforcement officer testifying to these statements must either have 5 years of experience or have completed a training course certified by the Commission on Peace Officer Standards and Training (POST) that includes training in investigating and reporting cases and testifying at preliminary hearings. Pen C §872(b). Completion of such a course, which qualifies the officer to testify, may be established by the officer's testimony and by the magistrate taking judicial notice of the POST's administrative regulations. *People v Dawkins* (1992) 10 CA4th 565, 569–571, 12 CR2d 633; *Hollowell v Superior Court* (1992) 3 CA4th 391, 395, 4 CR2d 321 (officer not qualified to testify when prosecution failed to establish training course was approved by POST).

b. [§92.66] Law Enforcement Officer Defined

For purposes of Pen C §872(b), law enforcement officer has been broadly defined to include many law enforcement personnel other than police officers, *e.g.,* correctional officers (see *People v Silver* (1995) 35 CA4th 1023, 1027–1028, 41 CR2d 379), arson investigators (see *Martin v Superior Court* (1991) 230 CA3d 1192, 1197–1198, 281 CR 682), and Franchise Tax Board investigators (see *Sims v Superior Court* (1993) 18 CA4th 463, 469–470, 22 CR2d 256). Any investigating agent or officer employed by a state, federal, or local agency, whose primary duty is to enforce the laws administered by that agency, and who otherwise meets the foundational experience qualifications of Pen C §872(b), may offer hearsay testimony at a preliminary hearing. 18 CA4th at 470.

c. [§92.67] Officer's Personal Knowledge

The testifying officer must have personal knowledge of the subject matter, *i.e.*, the officer must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the statement's reliability. *Whitman v Superior Court* (1991) 54 C3d 1063, 1072–1073, 2 CR2d 160. An officer may not merely recite what another officer has written in a police report, and multiple hearsay is inadmissible. 54 C3d at 1072–1073; *People v Sally* (1993) 12 CA4th 1621, 1626, 16 CR2d 161. See *Shannon v*

Superior Court (1992) 5 CA4th 676, 683–685, 7 CR2d 47 (officer's testimony about what another officer told him was proper because it was a single layer of hearsay; testifying to victim's statements to other officer was impermissible double hearsay); *People v Wimberly* (1992) 5 CA4th 439, 445–447, 6 CR2d 800 (officer could not testify to statements witness made to another officer).

d. [§92.68] Permissible Hearsay

Penal Code §872(b) places no limitations on the declarant whose out-of-court statements may be received in evidence through a qualified officer's testimony. *Whitman v Superior Court* (1991) 54 C3d 1063, 1073, 2 CR2d 160 (declarants include statements or reports of any persons). An officer may testify as to:

- An expert's statements, *e.g.,* in a DUI case, it is acceptable for an officer to testify about defendant's blood alcohol content based on phone conversation with a criminalist. See *Hosek v Superior Court* (1992) 10 CA4th 605, 608–609, 12 CR2d 650; *Curry v Superior Court* (2013) 217 CA4th 580, 592–596, 158 CR3d 707 (police investigator properly testified about pathologists' conclusions about toxicology results).
- The uncorroborated statements of a declarant who is not a coparticipant even though defendant is entitled to impeach that testimony with preliminary hearing witnesses or by establishing at trial that the witness is an accomplice. *Ruiz v Superior Court* (1994) 26 CA4th 935, 939–942, 31 CR2d 741.
- The confession of a nontestifying codefendant implicating defendant in charged offenses. *People v Miranda* (2000) 23 C4th 340, 349–354, 96 CR2d 758 (magistrate presumably well-equipped to consider and weigh possible unreliability of accomplice's statement in deciding whether to hold defendant for trial).
- A minor victim's out-of-court statements even if minor is not competent to testify at the preliminary hearing. *People v Daily* (1996) 49 CA4th 543, 551–552, 56 CR2d 787.
- A victim's or witness's statement conveyed through a translator. *Correa v Superior Court* (2002) 27 C4th 444, 452–467, 117 CR2d 27 (translation does not add hearsay layer when translator acts as language conduit and translated statement is fairly attributable to declarant).

e. [§92.69] Defendant's Rights

The defense may cross-examine all prosecution witnesses who testify, including an officer who testifies under Pen C §872(b). Pen C §865. Defendant may also present exculpatory hearsay evidence through a qualified officer's testimony under Pen C §872(b). *Nienhouse v Superior Court* (1996) 42 CA4th 83, 89–92, 49 CR2d 573. These opportunities for cross-examination and to call witnesses to rebut or qualify the officer's testimony satisfy due process. *People v Miranda* (2000) 23 C4th 340, 349, 354, 96 CR2d 758. See *People v Gonzales* (2012) 54 C4th 1234, 1265–1268, 144 CR3d 757 (seating juvenile witness at angle not facing defendants did not violate defendants' right to confront witness at video recorded preliminary hearing); *People v McCoy* (2013) 215 CA4th 1510, 1265–1268, 156 CR3d 382 (not error to play recorded preliminary examination for jury; defendant had similar motive for cross-examining witness at preliminary hearing as he did at trial despite addition of torture allegation after preliminary hearing).

3. [§92.70] Imposing Relevancy Standards of Pen C §866(b)

The purpose of a preliminary hearing is to establish if there is sufficient cause to believe that defendant has committed a felony. Pen C §866(b). See §92.86. This provision, together with the prohibition against using the preliminary hearing for discovery (see §92.71) and the restriction on defense testimony (see §92.72), has restored the narrow purpose of the preliminary hearing set forth in *People v Elliot* (1960) 54 C2d 498, 504, 6 CR 753, overruled on other grounds in 27 C3d 519, 528–529. See *Whitman v Superior Court* (1991) 54 C3d 1063, 1080–1081, 2 CR2d 160.

The hearing's scope and the admissibility of evidence should be restricted to the narrow purpose of the preliminary hearing. Testimony that does not relate to determining probable cause should be precluded. See *People v Williams* (1989) 213 CA3d 1186, 1189 n1, 1197, 262 CR 303.

4. [§92.71] Prohibiting Use of Hearing for Discovery Purposes

The preliminary hearing may not be used for discovery purposes, nor is the taking of depositions authorized. Pen C §866(b)–(c). The limitation on discovery is one of the major changes affecting the way the hearing is conducted. It abrogates the expansive hearing encouraged by *Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440, and *McDaniel v Superior Court* (1976) 55 CA3d 803, 126 CR 136.

Either party may informally ask opposing counsel for materials and information, and, if opposing counsel fails to provide it within 15 days, the requesting party may seek a court order. Pen C §1054.5(b). Discovery may be required from the other party before the preliminary hearing only if the

hearing is held more than 15 days after the request. See *People v Superior Court* (*Sturm*) (1992) 9 CA4th 172, 183, 11 CR2d 652 (upholding constitutionality of Pen C §1054.5); *People v Jenkins* (2000) 22 C4th 900, 950–951, 95 CR2d 377 (failure to provide discovery before preliminary hearing is not sanctionable absent showing of prejudice). But see *People v Gutierrez* (2013) 214 CA4th 343, 346, 153 CR3d 832 (prosecution's duty to disclose exculpatory evidence under *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 applies to preliminary hearings despite permissibility of hearsay evidence at preliminary hearings and reciprocity of discovery in criminal cases). See Simons, Preliminary Examinations §§2.1.7, 2.2.4.

5. [§92.72] Limiting Defense Testimony to Relevant and Helpful Witnesses Under Pen C §866(a)

Ordinarily, the defense role at a preliminary hearing is limited. In most cases, no defense witnesses are called and no affirmative defenses are litigated. Generally, the defense limits itself to cross-examining prosecution witnesses. *People v DeJesus* (1995) 38 CA4th 1, 15, 44 CR2d 796. See §92.69. The defendant may examine and cross-examine witnesses for the purpose of overcoming the prosecution's case or establishing an affirmative defense. *People v Williams* (1989) 213 CA3d 1186, 1189 n1, 262 CR 303. See *Nienhouse v Superior Court* (1996) 42 CA4th 83, 91, 49 CR2d 573 (right to present exculpatory evidence).

On a prosecution motion under Pen C §866(a), the magistrate must require an offer of proof from the defense as to a defense witness's expected testimony. See *People v Eid* (1994) 31 CA4th 114, 126–127, 36 CR2d 835 (inadequate offer of proof). The witness may not testify unless the offer of proof discloses to the magistrate's satisfaction that the witness's testimony, if believed, would be reasonably likely to:

- Establish an affirmative defense;
- Negate an element of the charged offense; or
- Impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness. Pen C §866(a).

If the magistrate determines that the proposed defense testimony does not meet at least one of these standards, the magistrate should not permit the witness to testify.

6. [§92.73] Limiting Cross-Examination of Prosecution Witnesses

In general, all prosecution witnesses who testify, including an officer testifying under Pen C §872(b) (see §92.65), may be cross-examined. Pen C §865. The cross examination may:

- Negate one of the elements of the charged offense. See *Jennings v Superior Court* (1967) 66 C2d 867, 877, 59 CR 440.
- Raise an affirmative defense. 66 C2d at 877.
- Impeach a witness. *Alford v Superior Court* (1972) 29 CA3d 724, 728, 105 CR 713.

Defendant's right to cross-examine prosecution witnesses is subject to these limitations:

- No cross-examination for discovery purposes. Pen C §866(b); *People v Williams* (1989) 213 CA3d 1186, 1189 n1, 262 CR 303. See §92.71.
- Cross-examination of a prosecution witness concerning probable cause for a search, in the absence of a motion to suppress, is irrelevant and, on objection, should be disallowed. 213 CA3d at 1189–1190, 1197. See *People v Barnes* (1990) 219 CA3d 1468, 1472–1473, 269 CR 44 (suppression motion only method of litigating search and seizure issues); §§92.76–92.80.
- Cross-examination that extends into matters unrelated to the crime and that affect only the direct testimony's weight may be excluded under Evid C §352. The magistrate may also exclude extrinsic evidence about events or transactions for which defendant is not being prosecuted, even if the testimony might be relevant to a prosecution witness's credibility. Examples are a prior misidentification by the witness who testifies to identification on direct examination or evidence of a crime committed by the witness to prove lack of truthfulness and credibility. *Farrell L. v Superior Court* (1988) 203 CA3d 521, 528, 250 CR 25; *People v Stone* (1983) 139 CA3d 216, 221, 188 CR 493. These limitations reflect the rule that a party may not cross-examine a witness on collateral matters to elicit something to be contradicted. *People v Lavergne* (1971) 4 C3d 735, 744, 94 CR 405.

When a prosecution witness is unavailable to testify at trial within the meaning of Evid C §240, the witness's preliminary hearing testimony may be admitted, provided defendant was given the opportunity to thoroughly cross-examine the witness. That a defendant did not have access to specific written records before questioning the witness at the preliminary

hearing does not mean defendant was denied a meaningful cross examination. See *People v Andrade* (2015) 238 CA4th 1274, 1295, 190 CR3d 442 (written statement to police); *People v Gonzales* (2012) 54 C4th 1234, 1262, 144 CR3d 757 (therapy records). A defendant who knows at the time of the preliminary hearing that it is likely that a prosecution witness will be unavailable to testify at trial, and who fails to take full advantage of the opportunity to cross-examine this witness at the preliminary hearing, cannot later complain when the prosecution seeks to admit the witness's preliminary hearing testimony after making a sufficient unavailability showing. See *People v Smith* (2003) 30 C4th 581, 611–612, 134 CR2d 1. See also *People v Andrade, supra*, 238 CA4th at 1292–1294 (good faith obligation to secure witness's trial attendance satisfied without issuing subpoena by calling witness and her family, checking multiple statewide databases, trying to contact witness on social media, following up with a potential spouse, and checking local hospitals).

See Simons, Preliminary Examinations §2.2.2 (extent of defense cross examination), §2.2.5 (represented defendant's right to cross-examine witnesses).

7. [§92.74] Prohibiting Defendant's Cross-Examination of Hearsay Declarant Under Evid C §1203.1

Generally, the declarant of a statement that is admitted as hearsay evidence may be called and examined about the statement by any adverse party as if under cross-examination. Evid C §1203. This provision does not apply, however, if the hearsay statement is offered at a preliminary hearing by a qualified law enforcement officer relating to an out-of-court statement under Pen C §872(b) (see §92.65). Evid C §1203.1.

Evidence Code §1203.1 is not, however, an absolute impediment to the calling of the prosecution's hearsay declarants at the preliminary hearing. *People v Erwin* (1993) 20 CA4th 1542, 1549–1551, 25 CR2d 348. A defendant's right under Pen C §866 to produce and examine defense witnesses at the preliminary hearing is not limited to witnesses the defendant wishes to call other than the hearsay declarants whose statements were introduced by the prosecution. No intent to impose such a limitation can be read into Evid C §§1203 and 1203.1. 20 CA4th at 1550. A defendant is entitled to call a hearsay declarant if the defendant makes a sufficient offer of proof under Pen C §866(a) (see §92.72) to establish a reasonable possibility that the declarant's testimony would substantially impeach in several material respects the victim's accounts to the testifying officer. 20 CA4th at 1551.

8. [§92.75] Advising Unrepresented Defendant of Privilege Against Compelled Self-Incrimination

A defendant who is represented by counsel may be a witness at the preliminary hearing. The court has no duty to advise such a defendant of the right against self-incrimination. A defendant who takes the stand effectively waives that right. *People v Thomas* (1974) 43 CA3d 862, 867, 118 CR 226.

A judge may, but is not required to, advise a self-represented defendant of the privilege against compelled self-incrimination. Any advisement must be neutral, *i.e.,* it must not favor one course of action. *People v Barnum* (2003) 29 C4th 1210, 1226, 131 CR2d 499. A defendant who chooses self-representation forgoes counsel's assistance together with the protection that counsel might have provided, which extends to advisement of the privilege against compelled self-incrimination. 29 C4th at 1221–1224. A self-represented defendant assumes the risk of defendant's ignorance and cannot compel the court to make up for counsel's absence. Such a defendant cannot reasonably expect the judge to provide an advisement of any right, including the privilege against compelled self-incrimination. 29 C4th at 1226.

G. Motion To Suppress Under Pen C §1538.5

1. Procedural and Practical Considerations

a. [§92.76] Noticed Motion Required

If at the preliminary hearing in a felony case the prosecution seeks to introduce any evidence, tangible or intangible, that is the product of an illegal search and seizure, defense counsel may move for its suppression. Pen C §1538.5(f)(1); see *People v McDonald* (2006) 137 CA4th 521, 528–529, 40 CR3d 422. California search and seizure procedure is codified in Pen C §1538.5. A defendant may file a suppression motion under Pen C §1538.5 to enlarge the scope of the preliminary hearing examination beyond determining if a public offense has been committed and whether there is probable cause to believe defendant is guilty. *People v Williams* (1989) 213 CA3d 1186, 1197, 262 CR 303.

All suppression motions must be in writing and accompanied by a proof of service and memorandum of points and authorities listing the specific items of property or evidence sought to be returned or suppressed and the factual basis and legal authorities that show why the motion should be granted. Pen C §1538.5(a)(2). The required specificity depends on the legal issue defendant is raising and the surrounding circumstances. Defendant need only be specific enough to give the court and the prosecution reasonable notice. *People v Smith* (2002) 95 CA4th 283, 296,

115 CR2d 483. Defendant need not guess what justifications the prosecution will offer for a contested warrantless search or seizure. Defendant may wait for the prosecution to present a justification and respond with objections. *People v Williams* (1999) 20 C4th 119, 130, 83 CR2d 275; *People v Smith*, *supra*, 95 CA4th at 295–300.

The moving papers must be filed with the court and personally served on the prosecution at least 5 court days before the hearing. If the defense was not aware of the evidence or the grounds for suppression before the preliminary hearing, the magistrate may grant a continuance of the hearing for at least 5 court days for the purpose of filing and serving the motion. Pen C §1538.5(f)(2). Any written response by the prosecution must be filed with the court and personally served on the defense at 2 court days before the hearing. Pen C §1538.5(f)(3).

Permitting the prosecution to respond orally to defendant's suppression motion does not violate due process. *People v Britton* (2001) 91 CA4th 1112, 1115, 111 CR2d 199. If the motion is denied at the preliminary hearing, defendant may renew it at a special hearing (see §92.81) and introduce evidence that could not reasonably have been presented earlier. Defendant may also file a new and improved memorandum of points and authorities at the special hearing, eliminating any shortcomings in defendant's legal arguments after the prosecution's preliminary hearing oral response. 91 CA 4th at 1115–1117.

See California Judges Benchbook: *Search and Seizure* §§6.42–6.47.

b. [§92.77] Grounds for Motion

A Pen C §1538.5 motion may not be used to challenge an allegedly illegal confession or identification unless it was the result of an illegal search or seizure. See *People v Mattson* (1990) 50 C3d 826, 850–852, 268 CR 802 (discussing right against self-incrimination and right to counsel).

Grounds for the motion include:

- The warrantless search was unreasonable. Pen C §1538.5(a)(1)(A).
- The search or seizure with a warrant was unreasonable because:
  - — the warrant was insufficient on its face;
  - — the property or evidence obtained was not described in the warrant;
  - — there was no probable cause to issue the warrant;
  - — the method of executing the warrant violated federal or state constitutional standards; or
  - — there was another violation of federal or state constitutional standards. Pen C §1538.5(a)(1)(B).

Warrantless search. Defendant must show the factual and legal bases for the motion, which is generally satisfied initially by alleging the absence of a warrant and making a prima facie supporting showing. *People v Williams* (1999) 20 C4th 119, 130, 136, 83 CR2d 275; *People v Smith* (2002) 95 CA4th 283, 288, 115 CR2d 483. The prosecution may respond by asserting that the search was made pursuant to a warrant, or the grounds justifying a warrantless search. *People v Williams, supra,* 20 C4th at 130, 135; *People v Smith, supra,* 95 CA4th at 289. Defendant may then file a reply challenging the prosecution's justification as inadequate. *People v Williams, supra,* 20 C4th at 130, 136; *People v Smith, supra,* 95 CA4th at 290. Defendant's failure to file a reply does not eliminate or diminish the prosecution's burden of establishing its justification. 95 CA4th at 290. See California Judges Benchbook: *Search and Seizure* §§5.48–5.160 (major exceptions to warrant requirement), §§3.95–3.107 (warrantless searches incident to temporary detention), and §§4.103–4.136 (warrantless searches incident to arrest).

Search with warrant. When a search or seizure is conducted under authority of a warrant, it is presumed to have been lawfully issued and executed, and it is defendant's burden to establish that the warrant is invalid or was unlawfully executed. Evid C §664; *People v Amador* (2000) 24 C4th 387, 393, 100 CR2d 617. A defendant may challenge the sufficiency of a supporting affidavit on its face, for example, claiming that the warrant lacks probable cause or resulted in the seizure of evidence not described in the warrant. Additionally, a defendant may challenge the truthfulness of the supporting affidavit by making a motion to traverse a search warrant, that is, claiming that the affidavit contained fatal mistakes or omissions. See California Judges Benchbook: *Search and Seizure* §§6.113–6.116 and California Judges Benchguide 58: *Motions To Suppress and Related Motions: Checklists* §§58.17–58.21 (Cal CJER).

See California Judges Benchbook: *Search and Seizure*, chap 2 (comprehensive discussion of search warrants and their execution).

c. [§92.78] Reasonable Expectation of Privacy (Standing)

Defendant must show a reasonable expectation of privacy in the place searched or the items seized. *Minnesota v Carter* (1998) 525 US 83, 88, 119 S Ct 469, 142 L Ed 2d 373; *Rawlings v Kentucky* (1980) 448 US 98, 104, 100 S Ct 2556, 65 L Ed 2d 633; *People v Ayala* (2000) 23 C4th 225, 255, 96 CR2d 682.

This burden exists whether or not there was a search warrant. See, *e.g.*, *Minnesota v Carter, supra* (no warrant at time of challenged observations); *People v Williams* (1992) 3 CA4th 1535, 1537, 5 CR2d 372

(search warrant). See California Judges Benchbook: *Search and Seizure* §§6.28–6.41 (standing).

d. [§92.79] Evidentiary Rules at Hearing

The judge or magistrate must receive evidence on any factual issue necessary to determine the suppression motion. Pen C §1538.5(c)(1). The rules in the Evidence Code apply at the hearing. *Hewitt v Superior Court* (1970) 5 CA3d 923, 927, 85 CR 493.

Excluding witnesses. While a witness is under examination during the hearing, the judge or magistrate, on the motion of either party, must exclude all potential and actual unexamined witnesses, order the witnesses not to converse with each other until they are all examined, order (if feasible) that the witnesses be separated from each other until they are all examined, and hold a hearing on the record to determine if the person sought to be excluded may be properly excluded. Pen C §1538.5(c)(2). This provision does not apply to the investigating officer, defendant's investigator, or officers having custody of persons brought before the court. Pen C §1538.5(c)(4). Either party may challenge the exclusion of any person under this provision. Pen C §1538.5(c)(3). See §§92.50–92.52 (motions to exclude witnesses under Pen C §867).

Defendant's testimony. If defendant testifies in support of the motion, this testimony is not admissible against defendant at trial, unless defendant does not object. This does not apply to incriminating testimony about crimes other than those charged. *King v Superior Court* (2003) 107 CA4th 929, 132 CR2d 585 (defendant cannot immunize other criminal conduct by testifying about it).

e. [§92.80] Limiting Motion to Evidence That Prosecution Seeks To Introduce at the Hearing

Defendant may move to suppress only evidence that the prosecution has sought to introduce at the preliminary hearing. Otherwise, the magistrate must disallow the motion. Pen C §1538.5(f)(1).

2. Defense Options When Motion Is Denied

a. [§92.81] Renewed Motion (Pen C §1538.5(i))

Defendant is generally limited to making one motion to suppress on specific evidence the prosecution seeks to introduce. Pen C §1538.5(i).
At the preliminary hearing, defendant may move to suppress evidence the prosecution seeks to introduce in that proceeding. See Pen C §1538.5(f).

If defendant makes the motion at the preliminary hearing, it can be renewed later at a special hearing if defendant has been held to answer.

Pen C §1538.5(i). Evidence offered at the special hearing is limited to the preliminary hearing transcript and evidence that could not reasonably have been presented at that hearing. Pen C §1538.5(i); *People v Drews* (1989) 208 CA3d 1317, 1324, 256 CR 846. See Simons, Preliminary Examinations §5.3.7. The prosecution is limited to the same evidence, but may recall preliminary hearing witnesses. Pen C §1538.5(i). See *People v Hansel* (1992) 1 C4th 1211, 1220, 4 CR2d 888 (prosecution may recall witnesses even if defendant presents no new evidence). Defendant cannot advance theories at the second hearing that were not raised and litigated during the first hearing. *People v Bennett* (1998) 68 CA4th 396, 406–407, 80 CR2d 323.

If the prosecution objects to defendant's presentation of evidence at the special hearing because the evidence could have reasonably been offered at the preliminary hearing, the court must hold an in camera hearing on that issue. Pen C §1538.5(i); *People v Drews*, *supra,* 208 CA3d at 1324. The court must base its ruling on the evidence presented at the special hearing and the preliminary hearing transcript and findings. The special hearing court is bound by factual findings at the preliminary hearing on evidence or property that are not affected by new evidence. Pen C §1538.5(i). See, *e.g., Anderson v Superior Court* (1988) 206 CA3d 533, 544, 253 CR 651 (magistrate's ruling that police officer who testified was more credible than defendant settled question of consent to search).

See California Judges Benchbook: *Search and Seizure* §§6.60–6.69.

b. [§92.82] Penal Code §995 Motion

Defendant may also seek review of the magistrate's suppression motion ruling by filing a Pen C §995 motion. *People v Laiwa* (1983) 34 C3d 711, 716–721, 195 CR 503. The motion is determined solely on the preliminary hearing transcript; no new evidence may be heard or considered. *People v Sahagun* (1979) 89 CA3d 1, 20, 152 CR 233.

3. Prosecution Options When Motion Is Granted and Case Dismissed

a. [§92.83] File New Complaint or Seek Indictment

If the magistrate dismisses the case at the preliminary hearing under Pen C §871 because insufficient evidence to support the holding order remains after suppressing illegally obtained evidence, the prosecution may file a new complaint or seek an indictment. Pen C §1538.5(j). The suppression motion ruling is not binding in any later proceeding except as limited by Pen C §1538.5(p). Pen C §1538.5(j). See also *Schlick v Superior Court* (1992) 4 C4th 310, 315, 14 CR2d 406 (explaining rule before 1993 enactment of Pen C §1538.5(p)).

The prosecution may not file another complaint or seek another indictment if defendant's suppression motion has been granted twice, unless there is new evidence relating to the motion that was not reasonably discoverable at the time of the second hearing. In such cases the motion must be reheard by the same judge who granted the motion at the first hearing, if available. Pen C §1538.5(p); *Soil v Superior Court* (1997) 55 CA4th 872, 877–881, 64 CR2d 319. "A judge may be found unavailable . . . only if the trial court, acting in good faith and taking reasonable steps, cannot arrange for that judge to hear the motion." *People v Rodriguez* (2016) 1 C5th 676, 679, 206 CR3d 588 (unavailability finding must be made on the record). The prosecution does not render this judge unavailable for purposes of rehearing the defendant's suppression motion by filing an affidavit of prejudice under CCP §170.6. To allow the prosecution to peremptorily challenge the judge who decided the first motion would sanction the forum shopping that Pen C §1538.5(p) was enacted to prevent. *People v Superior Court* (*Jimenez*) (2002) 28 C4th 798, 801, 805–809, 123 CR2d 31; *Barnes v Superior Court* (2002) 96 CA4th 631, 638–642, 117 CR2d 621.

b. [§92.84] Motion To Reinstate Complaint

The prosecution may move under Pen C §871.5 to reinstate the complaint, or the parts of the complaint for which defendant was not held to answer. Pen C §1538.5(j). The motion must be noticed within 15 days of the dismissal date. *People v Dethloff* (1992) 9 CA4th 620, 624, 11 CR2d 814. If the prosecution motion is denied, the prosecutor may not refile the dismissed action. Pen C §871.5(c). If it is granted, the magistrate will be directed to reinstate the complaint and issue a holding order. A motion to reinstate is proper even if the motion to suppress has been granted twice. *People v Toney* (2004) 32 C4th 228, 233–234, 82 P3d 778.

4. [§92.85] Prosecution Option When Motion Is Granted and Defendant Held To Answer; Special Hearing

If defendant is held to answer at the preliminary hearing, the magistrate's ruling granting the suppression motion is binding on the prosecution, unless it requests a special hearing to relitigate de novo the search or seizure's validity. Pen C §1538.5(j); *People v Jackson* (2002) 96 CA4th 1265, 1274–1275, 117 CR2d 886 (prosecution cannot escape binding effect of ruling by dismissing case after time for requesting special hearing and refiling case). Such a request must be made within 15 days of the preliminary hearing, on notice to defendant and the magistrate, and on filing an information. Pen C §1538.5(j). Defendant is entitled to a continuance of the hearing for up to 30 days. Pen C §1538.5(j). The

prosecutor is not entitled to a special hearing if defendant's motion to suppress has been granted twice. Pen C §1538.5(j). That the prosecution can obtain a de novo hearing of a suppression motion under Pen C §1538.5(j), a right that defendants do not have under Pen C §1538.5(i), does not violate due process or give the prosecution an unfair advantage. *People v Weaver* (1996) 44 CA4th 154, 158–160, 51 CR2d 602.

See California Judges Benchbook: *Search and Seizure* §§6.86–6.89.

H. Determining Whether To Issue Holding Order

1. [§92.86] Sufficient Cause

The magistrate must issue an order holding defendant to answer to the charges if the prosecution's evidence shows sufficient cause to believe the offense was committed, and defendant committed it. Pen C §§866(b), 872(a); *People v Superior Court* (*Shamis*) (1997) 58 CA4th 833, 842, 68 CR2d 388. Sufficient cause is generally equated with reasonable or probable cause. See *People v San Nicolas* (2004) 34 C4th 614, 654, 101 P3d 509; *People v Encerti* (1982) 130 CA3d 791, 800, 182 CR 139.

Sufficient cause is evidence of facts that would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion that a crime has been committed and that defendant is guilty. *People v San Nicolas, supra,* 34 C4th at 654; *Hatch v Superior Court* (2000) 80 CA4th 170, 184–185, 94 CR2d 453. If this test is met, the magistrate must issue a holding order. *People v DeJesus* (1995) 38 CA4th 1, 15, 44 CR2d 796. Evidence that will support a prosecution need not be sufficient to support a conviction. *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1026–1027, 13 CR2d 551; *Hatch v Superior Court, supra,* 80 CA4th at 185. There must merely be some rational ground to assume the possibility that an offense has been committed and defendant is guilty. 80 CA4th at 185. A defendant may be held to answer based on an accomplice's uncorroborated testimony. *Arteaga v Superior Court* (2015) 233 CA4th 851, 866, 182 CR3d 914. The evidence need not be unambiguous. It is sufficient that a reasonable possibility of guilt is raised. *People v Superior Court* (*Kneip*) (1990) 219 CA3d 235, 238–239, 268 CR 1.

In weighing the evidence to support sufficient cause, the magistrate determines the testifying witnesses' credibility. The magistrate need not give credence to a witness's testimony when there are grounds for disbelief. *People v Uhlemann* (1973) 9 C3d 662, 668, 108 CR 657.

At the preliminary hearing, the magistrate, without first making a separate probable cause determination, may order defendant to provide a fingerprint to identify defendant as the perpetrator. See *Virgle v Superior Court* (2002) 100 CA4th 572, 573-575, 122 CR2d 542 (print found at

crime scene matched print on known print card for man with defendant's name; exemplar from defendant was necessary to determine if defendant was person whose fingerprints were on card).

2. Applying Sufficient Cause Standard

a. [§92.87] Elements of Offense

Sufficient cause must be found for every element of the statutory offense charged and may be based on the magistrate's reasonable inferences drawn from circumstantial evidence. *Williams v Superior Court* (1969) 71 C2d 1144, 1148, 80 CR 747; *People v Casillas* (2001) 92 CA4th 171, 178, 111 CR2d 651. Although the prosecution's required evidentiary showing is minimal, the failure to present any evidence on an element of the charged offense requires dismissal of the allegation. 91 CA4th at 149 n4.

Degree. The magistrate does not make probable cause determinations about the offense's degree. *People v Buckley* (1986) 185 CA3d 512, 522, 228 CR 329.

Penal Code §664(a) increases the punishment for a deliberate and premeditated attempted murder without dividing the crime into degrees. This was previously held to be a penalty provision that only increases punishment. See *People v Bright* (1996) 12 C4th 652, 669, 49 CR2d 732, overruled based on *Apprendi v New Jersey* (2000) 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 in 34 C4th 535, 550 (double jeopardy bars retrial after appellate reversal of premeditation allegation equivalent to element of greater crime because it increased punishment beyond statutory maximum); *Huynh v Superior Court* (1996) 45 CA4th 891, 894–896, 54 CR2d 336. But now prosecutors must present preliminary hearing evidence supporting deliberation and premeditation allegations. *Huynh v Superior Court*, *supra*. See Simons, Preliminary Examinations §4.1.6.

☛ JUDICIAL TIP: If there is any uncertainty about the elements constituting a crime, judges generally review the statutory definition of the offense. If further guidance is needed, some consult the appropriate CALCRIM or CALJIC instruction. Many judges also list each element of the offense that must be proved. In taking notes during the preliminary hearing, they check each element listed when evidence to support the element is presented.

b. [§92.88] Prior Conviction

Prior conviction as an element of offense. The prosecution must prove any prior conviction that is an element of the charged offense. See, *e.g., People v Baird* (1995) 12 C4th 126, 129, 48 CR2d 906 (defendant's ex-felon status in prosecution for violation of possession of a firearm by a

convicted felon under Pen C §12021 "is an element of the offense"). When a prior conviction is an element of the offense and no evidence of that conviction is presented at the preliminary hearing, there is no ground for charging the offense in the information. *Salazar v Superior Court* (2000) 83 CA4th 840, 842, 846, 100 CR2d 120.

Prior conviction that elevates a charged offense to a felony. The prosecution must prove any prior conviction that serves to elevate a charged offense from a misdemeanor. See, *e.g.*, *People v Casillas, supra,* 92 CA4th at 174 (defendant cannot be held to answer for felony DUI under Veh C §23152 absent preliminary hearing proof of three separate prior DUI violations resulting in convictions).

When a prior conviction is essential to making an offense a felony, it must be proved. *Thompson v Superior Court* (2001) 91 CA4th 144, 159, 110 CR2d 89. The prior conviction requirement of petty theft with a prior under Pen C §666 is not an element of the statutory offense that must be determined by a jury; it is a sentencing enhancement. *People v Bouzas* (1991) 53 C3d 467, 478, 279 CR 847. Most judges believe that *Bouzas* does not affect *Thompson's* principle rule. Thus, if a defendant charged with violating Pen C §666 refuses to admit the prior, the magistrate probably cannot find sufficient cause for a Pen C §666 violation unless the prosecution proves the prior at the preliminary hearing. See *People v Nguyen* (1997) 54 CA4th 705, 714, 63 CR2d 173.

c. [§92.89] Enhancements

The magistrate must also determine if the prosecution has presented sufficient preliminary hearing evidence to establish probable cause on enhancement allegations that are directly or transactionally related to the charged offense. *Thompson v Superior Court* (2001) 91 CA4th 144, 149, 110 CR2d 89. See *People v Superior Court* (*Mendella*) (1983) 33 C3d 754, 757, 763, 191 CR 1, superseded by statute on another point as stated in 6 Cal.4th 801, 814 n8 (prosecution must present sufficient evidence at preliminary hearing to support great bodily injury enhancement); *Salazar v Superior Court* (2000) 83 CA4th 840, 845–846, 100 CR2d 120 (proof of criminal street gang enhancement is required at preliminary hearing).

But the prosecution need not prove at the preliminary hearing prior felony convictions unrelated to the charged crime to be used as enhancements. These enhancements include the habitual criminal statute (Pen C §667(a)) and the three strikes law (Pen C §667(b)–(i)). *People v Shaw* (1986) 182 CA3d 682, 684–686, 227 CR 378; *Thompson v Superior Court* (2001) 91 CA4th 144, 147, 110 CR2d 89. Requiring proof of these allegations at preliminary hearings is inconsistent with Pen C §969a, which allows the prosecution to amend a pending indictment or

information to allege omitted prior felonies. 91 CA4th at 156–157. The magistrate may strike or dismiss enhancements lacking sufficient cause. *People v Superior Court* (*Mendella*), *supra,* 33 C3d at 762 n8.

d. [§92.90] Special Circumstances

The magistrate should determine the sufficiency of evidence relating to special circumstances. See *Ghent v Superior Court* (1979) 90 CA3d 944, 955–958, 153 CR 720. If there is insufficient cause to support the alleged special circumstance, it should be dismissed or stricken under Pen C §871. *Ramos v Superior Court* (1982) 32 C3d 26, 34, 184 CR 622.

See Simons, Preliminary Examinations §§4.1.4.

e. [§92.91] Misdemeanors Charged With Felony

The preliminary hearing's purpose is to determine if sufficient cause exists to believe defendant has committed a felony. Pen C §866(b). Before being amended by Proposition 115, the statute referred to an offense. Most judges think the change to felony does not affect preexisting law that required sufficient cause to be determined for misdemeanors alleged in the complaint that are transactionally related to felonies. If a transactionally related misdemeanor is charged together with a felony, the magistrate must find sufficient cause on the misdemeanor or the holding order cannot be issued on the misdemeanor. *People v Thiecke* (1985) 167 CA3d 1015, 1017, 213 CR 731. See also *Griffith v Superior Court* (2011) 196 CA4th 943, 947–948, 126 CR3d 848.

Some judges strictly construe the changes made by Proposition 115 and will not determine sufficient cause for misdemeanors, even if they are transactionally related to a felony.

See Simons, Preliminary Examinations §§4.1.7–4.1.8.

3. [§92.92] Discharging Defendant for Insufficient Cause Under Pen C §871

If, after the presentation of evidence, the magistrate determines that no public offense has been committed or that there is insufficient cause to believe defendant is guilty of the charged offense, the magistrate must order the complaint dismissed and defendant discharged. Pen C §871. See *People v Mower* (2002) 28 C4th 457, 473, 122 CR2d 326 (absent reasonable or probable cause to believe defendant is guilty of possession or cultivation of marijuana, because of defendant's status as a qualified patient or primary caregiver, magistrate should end prosecution).

The magistrate must also sign an endorsement to this effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order that the complaint be dismissed and that

he or she shall be discharged." Pen C §871. A magistrate's finding of insufficient cause after a preliminary hearing alone does not meet defendant's burden of proof when requesting a finding of factual innocence under Pen C §851.8(c). *People v Esmaili* (2013) 213 CA4th 1449, 1459–1462, 153 CR3d 625.

4. Effect of Discharge for Insufficient Cause

a. [§92.93] In General

If the magistrate dismisses the complaint for insufficient cause, the dismissal counts toward the general rule of Pen C §1387 barring further prosecution after two dismissals have occurred. Usually, the prosecutor may refile the complaint once after a first dismissal.

b. [§92.94] Two-Dismissal Rule

The two-dismissal rule of Pen C §1387 generally bars further prosecution of a felony or a misdemeanor charged together with a felony if the same offense is dismissed twice for one of these reasons:

- Lack of prosecution under Pen C §1381.
- In furtherance of justice under Pen C §1385.
- Violation of the 60-calendar-day rule for conducting the preliminary hearing under Pen C §859b. See §92.40.
- Violation of the one-session rule under Pen C §861. See §§92.45–92.47.
- Insufficient cause for holding defendant to answer under Pen C §871. See §92.86.
- Information or indictment set aside under Pen C §995.

c. [§92.95] Exceptions to Two-Dismissal Rule

Renewed prosecution is permitted after a second dismissal if the court finds one of these general exceptions (Pen C §1387(a)(1)–(a)(2)):

- Substantial new evidence has been discovered by the prosecution that could not have been known through the exercise of due diligence at, or before, dismissal.
- Termination of the prosecution was the result of the direct intimidation of a material witness as shown by a preponderance of the evidence.

There are two more specific grounds for renewed prosecution, both of which only apply within 6 months of the action's original dismissal, and may be invoked only once (Pen C §1387(a)(3)–(a)(4)):

- The action was terminated because the personally subpoenaed complaining witness failed to appear in a prosecution arising under Pen C §243(e), §262, §273.5, or §273.6.

  The action was terminated because the complaining witness in a domestic violence or sexual assault prosecution was found in contempt under CCP §1219(b).

Moreover, the dismissal of the information on the nonstatutory ground that it was a duplicate of another filing does not come within the two-dismissal rule of Pen C §1387. *Berardi v Superior Court* (2008) 160 CA4th 210, 225, 72 CR3d 664.

Additional exceptions to the two-dismissal rule apply when the previous action was terminated under Pen C §859b, §861, §871, or §995 and one of these conditions occurs (Pen C §1387(c)):

- The prosecution shows good cause why the preliminary hearing was not held within 60 days leading to dismissal under Pen C §859b. See §§92.37–92.39.
- The motion under Pen C §995 was granted because of (1) defendant's present insanity; (2) lack of counsel after defendant chose self-representation rather than representation by appointed counsel; (3) ineffective assistance of counsel; (4) defense counsel's conflict of interest; (5) violation of time limits based on the defense counsel's unavailability; or (6) defendant's motion to withdraw a waiver of the preliminary hearing.
- The motion under Pen C §995 was granted after dismissal by the magistrate of the action under Pen C §871 and defendant was recharged under Pen C §739.

See Simons, Preliminary Examinations §4.4.7 (exceptions to the two-dismissal rule as to actions dismissed under Pen C §995), §4.4.13 (filing felony or a misdemeanor after earlier dismissal).

d. [§92.96] Violent Felony Exception to Two-Dismissal Rule

Penal Code §1387.1 provides a statutory exception to the two-dismissal rule for defendants charged with violent felonies as defined in Pen C §667.5.

If either of the first two dismissals were for excusable neglect, the prosecution is permitted one additional opportunity to refile the charges. But no additional refiling is allowed if the prosecution's conduct amounts to bad faith. Pen C §1387.1(a).

Excusable neglect includes, but is not limited to, error on the part of the court, prosecution, law enforcement, or witnesses. Pen C §1387.1(b);

see *People v Massey* (2000) 79 CA4th 204, 210–211, 93 CR2d 890 (defining excusable neglect as neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances, *e.g.,* prosecution's failure to have witnesses in court on trial date after making reasonable efforts to secure their attendance); *People v Mason* (2006) 140 CA4th 1190, 1196–1197, 45 CR3d 256 (excusable neglect when victim witness was unavailable without prosecutor's knowledge and after numerous postponements where victim had been available; prosecutor had reason to believe victim would be available).

For the violent felony exception to apply, the violent felony offense for which charges may be refiled must be one of the charged offenses previously dismissed. Otherwise, the prosecution could avoid the statutory consequence of two prior dismissals by overcharging an offense in a third filing. *People v Salcido* (2008) 166 CA4th 1303, 1312–1313, 83 CR3d 561. See Simons, Preliminary Examinations §4.4.6.

e. [§92.97] Setting Misdemeanor for Trial

When a defendant charged with a felony and a misdemeanor is not held to answer on the felony, the magistrate must order defendant arraigned on the misdemeanor and fix a trial date. *People v Hardin* (1967) 256 CA2d Supp 954, 961, 64 CR 307. If the misdemeanor is dismissed, Pen C §1387 bars any further prosecution for the same offense. *Marler v Municipal Court* (1980) 110 CA3d 155, 162, 167 CR 666.

f. [§92.98] Dismissal of Part of a Complaint

Dismissal of part of the complaint is subject to the two-dismissal rule. A magistrate's dismissal of a special circumstance allegation is an order terminating the action under Pen C §1387 and is subject to the rule. *Ramos v Superior Court* (1982) 32 C3d 26, 34, 184 CR 622. But see *People v Dietrick* (2013) 220 CA4th 1472, 1475–1477, 163 CR3d 789 (dismissal of penalty allegations elevating misdemeanor to felony, followed by dismissal of misdemeanor, did not bar further prosecution under two-dismissal rule).

5. [§92.99] Dismissal in Furtherance of Justice Under Pen C §1385

A magistrate may dismiss an action in the interests of justice, either on the court's own motion or on the prosecutor's application. Pen C §1385(a). The reasons for the dismissal must be stated on the record, and must be set forth in a minute order upon either party's request if case proceedings are not being recorded electronically or reported by a court reporter. Pen C §1385(a). Although defendant has no statutory authority to

move to dismiss in furtherance of justice, defendant may invite the court to do so under Pen C §1385. See *People v Konow* (2004) 32 C4th 995, 1022, 88 P3d 36; *People v Harris* (1991) 227 CA3d 1223, 1225, 278 CR 391. A magistrate's failure or refusal to respond to defendant's invitation and hear a motion to dismiss based on a legal ground for dismissing the prosecution does not make defendant's commitment illegal. *Jackson v Superior Court* (1982) 135 CA3d 767, 771, 185 CR 766; but see *People v Konow*, *supra*, 32 C4th at 1025 n10 ("to the extent [*Jackson*] . . . suggest[s] that the magistrate's failure cannot deny a defendant a substantial right affecting the legality of the commitment even when the failure is prejudicial as well as erroneous, [*Jackson*] is unsound . . . and is . . . disapproved.").

A determination of whether to dismiss in the interests of justice involves a weighing of the evidence of defendant's guilt or innocence, a consideration of the crime involved, the length of defendant's incarceration, the possible burden placed on defendant by a retrial, and the likelihood of additional evidence being presented in a retrial. *People v Superior Court* (*Howard*) (1968) 69 C2d 491, 505, 72 CR 330.

These are proper grounds for dismissal:

- There is insufficient evidence to support a conviction. See, *e.g.*, *People v Polk* (1964) 61 C2d 217, 229, 37 CR 753.
- The prosecutor cannot proceed because witnesses are unavailable or because the prosecutor wants to refile to add defendants or counts. See *Casey v Superior Court* (1989) 207 CA3d 837, 844, 255 CR 81.

See Simons, Preliminary Examinations §§4.3–4.3.3.

6. [§92.100] Issuing Holding Order Under Pen C §872(a)

A magistrate who finds sufficient cause to support the allegations against defendant must issue a holding order and sign the order endorsed on the complaint as follows: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the facts, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe that the within named A. B. is guilty, I order that he or she be held to answer to the same." Pen C §872(a).

The magistrate must specify in the holding order the offenses for which defendant is bound over for trial. *People v Estrada* (1987) 188 CA3d 1141, 1147, 233 CR 754. If the offense is bailable and defendant is admitted to bail, a statement to that effect must be added to the order. Pen C §875. If the offense is not bailable, the order must state that defendant is committed to the county sheriff. Pen C §873.

In addition to the holding order endorsed on the complaint, the magistrate must also make out and sign a commitment. Pen C §876. The commitment must include the magistrate's name and must be delivered, together with defendant, to the custodial or peace officer. Pen C §876. The form of commitment for a defendant after a probable cause determination is set forth in Pen C §877. The form of commitment for a defendant who has pleaded guilty is listed in Pen C §877a.

I. Motion To Reduce Felony (Wobbler) to Misdemeanor

1. [§92.101] Determining Whether To Grant Reduction of Felony to Misdemeanor

A felony is a crime punishable by death or imprisonment in state prison. Every other crime or public offense is a misdemeanor except those classified as infractions. Pen C §§17(a), 18. Some offenses include alternative penalties, *i.e.*, confinement in state prison or county jail. Such an offense is a felony when the punishment is confinement in state prison and a misdemeanor when any other punishment is imposed. This type of offense, with alternative sentences, is commonly called a wobbler.

A magistrate may decide that a wobbler charged as a felony is a misdemeanor and thus reduce the charge at or before the preliminary hearing. The magistrate may make this determination on a party's motion or sua sponte after considering the evidence. Pen C §17(b)(5). The magistrate does not need the prosecution's consent. *Esteybar v Municipal Court* (1971) 5 C3d 119, 127, 95 CR 524. The magistrate must base the determination on the case's facts and circumstances. 5 C3d at 125; *People v Kunkel* (1985) 176 CA3d 46, 52 n6, 221 CR 359.

A magistrate may reduce a wobbler, even in a three strikes case. See *People v Superior Court* (*Alvarez*) (1997) 14 C4th 968, 979–981, 60 CR2d 93; Simons, Preliminary Examinations §§4.5.8–4.5.9.

A magistrate cannot:

- Reduce a felony that is not a wobbler. *People v Superior Court* (*Feinstein*) (1994) 29 CA4th 323, 330, 34 CR2d 503 (magistrate may not substitute other related charges).
- Reduce a felony to a different crime. 29 CA4th at 329.
- Fix an offense's degree. *People v Estrada* (1987) 188 CA3d 1141, 1147, 233 CR 754; *People v Buckley* (1986) 185 CA3d 512, 522, 228 CR 329. If an offense has varying degrees, such as burglary, and only the lesser one is a wobbler, the magistrate cannot reduce it to a lesser degree and then to a misdemeanor without the prosecutor's consent, unless the evidence shows only the lesser degree. See Pen C §§1192.1–1192.2, 1192.4.

- Reduce the charges to a misdemeanor when the court has ordered felony counts to be reinstated under Pen C §871.5. *People v Draper* (1996) 42 CA4th 1627, 1631–1634, 50 CR2d 335.

If the prosecutor seeks to reduce a felony offense to a misdemeanor, defendant can require it to remain a felony. Pen C §17(b)(4); *Larson v Municipal Court* (1974) 41 CA3d 360, 362–365, 116 CR 1.

After the magistrate has reduced the felony to a misdemeanor under Pen C §17(b)(5), the prosecution may not dismiss and refile the charge as a felony unless the magistrate consents. *Malone v Superior Court* (1975) 47 CA3d 313, 318–319, 120 CR 851. Nor may the prosecution bring a motion to reinstate the felony. *People v Williams* (2005) 35 C4th 817, 822–823, 110 P3d 1239.

☛ JUDICIAL TIP: Most judges treat motions to reduce a wobbler as sentencing decisions. They require sufficient information about offense and offender to make an informed decision based on the case's facts. Judges usually consider prevailing sentencing practices. If the motion is made at a prehearing conference as part of plea negotiation, some judges will review the probation report and ask the prosecution if they oppose the motion and, if so, to state why. This gives the court a more complete basis to decide the motion before the preliminary hearing.

Some judges consider if the facts warrant granting an immediate reduction or if defendant should earn one by successfully completing probation. A defendant who is granted felony probation without imposition of a sentence on a wobbler can move to have it reduced to a misdemeanor after successfully completing probation. Pen C §17(b)(3).

Most judges refuse to grant a reduction before hearing evidence at the preliminary hearing. If defense counsel and the prosecution both request the reduction, many judges will ask them to present a stipulated set of facts, including information on the offender, before ruling.

See Simons, Preliminary Examinations §§4.5.1–4.5.4, 4.5.7–4.5.11.

2. [§92.102] Ruling on Motion Not To Be Conditioned on Defendant's Plea

The magistrate may not require defendant to plead guilty as a condition of reducing the charge to a misdemeanor under Pen C §17(b)(5). *Jackson v Superior Court* (1980) 110 CA3d 174, 177, 167 CR 749. The magistrate also may not ask how defendant would plead if the magistrate were to reduce the charge to a misdemeanor under Pen C §17(b)(5). *Hartman v Superior Court* (1982) 135 CA3d 205, 207–209, 185 CR 182.

☛ JUDICIAL TIP: Most judges will accept a plea bargain that entails the grant of a Pen C §17(b)(5) motion by the magistrate.

Judges may also accept a conditional plea of guilty to a felony, *e.g.,* that no state prison be imposed. This arrangement is not equivalent to the grant of a Pen C §17(b)(5) motion.

See Simons, Preliminary Examinations §§4.5.5–4.5.6.

J. Motion To Reduce Bail and To Release on Own Recognizance (OR)

1. [§92.103] In General

After the magistrate has issued a holding order, defense counsel often requests a bail reduction or that defendant be released on OR. The magistrate should consider these motions before committing defendant for trial.

2. [§92.104] Setting Bail

A defendant who has been held to answer may be admitted to bail by the same magistrate or any magistrate who has the power to issue a writ of habeas corpus. Pen C §§1273, 1277–1278. Once the magistrate has allowed bail and the undertaking has been executed and approved, the magistrate must order defendant discharged and deliver the order to the officer in charge. Pen C §1281.

A defendant is generally entitled to be released on bail unless the charge is (Cal Const art I, §12; Pen C §1271):

- A capital offense with evident facts or a great presumption;
- A violent felony with evident facts or a great presumption, and the court finds by clear and convincing evidence a substantial likelihood that defendant's release would result in great bodily harm to another; or
- Any felony with evident facts and a great presumption, and the court finds by clear and convincing evidence that defendant has threatened another with great bodily harm and there is a substantial likelihood that defendant would carry out the threat if released.

The magistrate must determine the existence of a substantial likelihood of harm based on the case's specific circumstances. *In re Nordin* (1983) 143 CA3d 538, 543, 192 CR 38.

In setting, reducing, or denying bail, public safety and the victim's safety are the primary considerations, but the victim's family's safety, the offense's seriousness, defendant's previous criminal record, and the probability of defendant's later appearances must be considered. Cal Const

art I, §28(b)(3), (f)(3); Pen C §1275(a)(1). Penal Code §1275(a)(2) lists factors relevant to the seriousness of the offense charged. In setting bail, a magistrate may also consider factors such as the information included in an investigative report prepared under Pen C §1318.1. Pen C §1275(a)(1). The magistrate's statement of reasons for setting bail should contain more than mere findings of ultimate fact or a recitation of the relevant criteria for bail release. It should clearly articulate the basis for the magistrate's use of such criteria. *In re Christie* (2001) 92 CA4th 1105, 1107, 1109–1110, 112 CR2d 495 (magistrate must include reasons for setting bail in excess of bail schedule).

See California Judges Benchguide 55: *Bail and Own-Recognizance Release* §§55.2 (checklist), 55.9–55.19 (Cal CJER).

3. [§92.105] OR Release

Some defendants may be released on their own recognizance in the court's discretion. Cal Const art I, §§12, 28(f)(3). Any defendant who has been charged with a noncapital offense is entitled to OR. Pen C §1270(a); see Pen C §§1318 et seq (limitations). It may be granted by a court or magistrate who could release defendant from custody on bail, unless the court finds on the record in accordance with Pen C §1275 that an OR release will compromise public safety or the victim's safety, or will not reasonably assure defendant's appearance at later proceedings. Pen C §1270(a). Cal Const art I, §28(f)(3). Public safety and the victim's safety are the primary considerations. Cal Const art I, §28(f)(3). If the court makes one of these findings, it must set bail and specify any release conditions. Pen C §1270(a). A hearing must be held before the OR release of a defendant charged with a serious or violent felony or certain other witness tampering and domestic-related felonies where force or threat of violence are elements of the crime. Pen C §1270.1(a).

In addition, a noticed hearing must be held in open court before a defendant arrested for a violent felony (see Pen C §667.5) may be released on OR. Pen C §1319(a). OR may not be granted if it appears by clear and convincing evidence that defendant failed to appear for a prior felony case. Pen C §1319(b). In all other cases, the court must consider any outstanding felony warrants, other information presented in a Pen C §1318.1 report, and any other information the prosecution presents in deciding whether to grant OR. Pen C §1319(b).

A defendant may not be released on OR without an open court hearing if defendant (1) is currently on felony probation or felony parole, or (2) has failed to appear, resulting in a warrant being issued three or more times over the 3 years before the current arrest and is arrested for any

felony offense or certain other crimes (street terrorism, assault and battery, theft, burglary, or a crime with firearm use). Pen C §1319.5.

See California Judges Benchguide 55: *Bail and Own-Recognizance Release* §§55.4 (checklist) and 55.43–55.48 (Cal CJER).

K. Making Findings at Preliminary Hearing

1. [§92.106] Scope of Findings

At the preliminary hearing, the magistrate has no authority to make findings about defendant's guilt or innocence. See *People v McGlothen* (1987) 190 CA3d 1005, 1011, 235 CR 745. The magistrate's limited role is to decide if there is sufficient cause to believe defendant is guilty of a public offense and should be bound over for trial. See Pen C §872; §92.86. In making this determination, the magistrate may weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses. *People v Uhlemann* (1973) 9 C3d 662, 667, 108 CR 657.

Factual and legal findings are permitted. See §§92.106, 92.108. The magistrate may make factual findings not only on charged counts, but on uncharged counts and enhancements arising from the evidence presented. *People v Manning* (1982) 133 CA3d 159, 165, 183 CR 727.

2. [§92.107] Adding Charges in Information

In addition to the charges contained in the holding order, the prosecution may file an information including a charge or charges under Pen C §739 that are shown by the preliminary hearing evidence and are not inconsistent with the magistrate's factual findings. *Jones v Superior Court* (1971) 4 C3d 660, 664, 94 CR 289. The preliminary hearing evidence must show that the additional charge is transactionally related to the offense for which defendant was held to answer. 4 C3d at 665; *People v Encerti* (1982) 130 CA3d 791, 799, 182 CR 139. The totality of the preliminary hearing evidence, not the complaint alone, gives defendant notice of the potential charges at trial. *People v Manning* (1982) 133 CA3d 159, 165, 183 CR 727.

If defendant waived the preliminary hearing, the prosecutor may not allege additional charges in the information because Pen C §1009 prohibits amending the information to charge an offense not shown by preliminary hearing evidence. *People v Winters* (1990) 221 CA3d 997, 1005–1008, 270 CR 740. See *People v Rogers* (2016) 245 CA4th 1353, 1362, 200 CR3d 355 ("prosecution may not add a conduct enhancement to the information after a defendant has waived a preliminary hearing").

See Simons, Preliminary Examinations §§4.6.1–4.6.6.

3. [§92.108] Distinguishing Factual Findings From Legal Conclusions

Factual findings are binding on the prosecution; legal conclusions are not. See *People v Uhlemann* (1973) 9 C3d 662, 667, 108 CR 657.

Appellate decisions recognize the considerable uncertainty in distinguishing factual findings from legal conclusions. See, *e.g., People v Superior Court* (*Day*) (1985) 174 CA3d 1008, 220 CR 330. Some findings can be clearly differentiated from conclusions. A witness's credibility is a question of fact for the magistrate. A reviewing court will not substitute its judgment for the magistrate's. *Jones v Superior Court* (1971) 4 C3d 660, 664, 94 CR 289.

If a magistrate decides the evidence is legally insufficient to show the charge, that is a legal conclusion. 4 C3d at 664. See *People v Bautista* (2014) 223 CA4th 1096, 1099, 1101, 167 CR3d 719 (trial court should independently review magistrate's conclusion about evidence's sufficiency). A magistrate finding no evidence of malice in a murder prosecution is also a legal conclusion. *Dudley v Superior Court* (1974) 36 CA3d 977, 981, 111 CR 797.

Factual findings include findings that the offense never occurred, the victim consented, or a witness was not credible. Legal conclusions are determinations that the evidence does not support the charges or a particular element was not proved. See *People v Superior Court* (*Quinteros*) (1993) 13 CA4th 12, 20, 16 CR2d 462.

Another reason for distinguishing factual findings from legal conclusions is that only legal conclusions may be challenged by the defense on a Pen C §995 motion or by the prosecution on a Pen C §871.5 petition.

See Simons, Preliminary Examinations §4.6.2.

4. [§92.109] Effect of Factual Findings on Information

The prosecutor may not include in the information any new offenses transactionally related to the charges for which defendant was held to answer, or any charges in the complaint that were rejected at the preliminary hearing, if the magistrate made factual findings inconsistent with the new or rejected charges. *People v Slaughter* (1984) 35 C3d 629, 643, 200 CR 448. The magistrate's power to make factual findings controls the ultimate disposition of the filed charges. *Jones v Superior Court* (1971) 4 C3d 660, 667, 94 CR 289.

In contrast, the magistrate's legal conclusions do not limit the prosecutor's discretion to file new or rejected charges in the information. *People v Encerti* (1982) 130 CA3d 791, 799, 182 CR 139. If the magistrate makes a legal conclusion that one of the charges has not been

proved and dismisses it, the prosecutor may include it in the information. *People v Farley* (1971) 19 CA3d 215, 221, 96 CR 478.

☛ JUDICIAL TIP: If the magistrate does not believe a witness whose testimony is essential to sustaining a charge, the magistrate should make a clear finding on the witness's credibility. That factual finding controls the prosecutor's discretion in filing new or rejected charges.

5. [§92.110] Making Findings on Sufficiency of Evidence To Support Allegations of Uncharged Offenses

An appellate court has held that defendant may request a ruling from the magistrate on the sufficiency of the preliminary hearing evidence for every possible charge that may be alleged against defendant in the information. *People v Brice* (1982) 130 CA3d 201, 210, 181 CR 518. But another court criticized *Brice* as "an attempt to create a substantial right to a useless, nonbinding determination" and declined to follow it as "dictum." *People v Estrada* (1987) 188 CA3d 1141, 1147, 233 CR 754. See *People v Buckley* (1986) 185 CA3d 512, 522, 228 CR 329 (reiterating that magistrate's findings are discretionary except the legal conclusion of evidentiary sufficiency). See also *People v Estrada*, *supra*, 188 CA3d at 1146 (magistrate must only make findings for offenses magistrate believes defendant committed, not on each possible charge).

☛ JUDICIAL TIP: Some judges preface their response to a *Brice* ruling request with this admonition: "I will make the ruling you request though it is nonbinding and will not preclude the District Attorney from filing uncharged offenses under Pen C §739."

6. [§92.111] Motion Under Pen C §17(b)(5) Regarding Uncharged Offenses

If a magistrate responding to a defendant's *People v Brice* (1982) 130 CA3d 201, 181 CR 518 request (see §92.110) rules on the evidentiary sufficiency of uncharged offenses, the magistrate must also rule on the defendant's request to reduce any uncharged wobblers to a misdemeanor. *People v Manning* (1982) 133 CA3d 159, 165, 183 CR 727; see §92.101.

IV. SAMPLE FORMS

A. [§92.112] Script: Waiver of Preliminary Hearing

(1) *Call the case:*

People versus _____.

[*To defendant*]

Are you [*Mr./Ms.*] [*name of defendant*], the defendant in this case?

(2) *Proposed waiver*:

[*Mr./Ms.*] [*name of defendant*], you are here charged with [*summarize charges in complaint*]. You have a right to a preliminary hearing on those charges. Your lawyer tells me that you want to give up that right. Is that correct?

[*If there are conditions on the waiver*]

I understand the parties have agreed to conditions on the waiver, and [*your lawyer/the prosecutor*] is going to state those conditions for the record. Please listen to those conditions so we can make sure you understand them. Ask me if you have questions about them.

[*Defense counsel or prosecutor states conditions*]

Note: Ordinarily, if a defendant waives a preliminary hearing, the prosecution may not file additional charges in the information, but is limited to the charges in the complaint. However, a waiver may be conditioned on the agreement that the prosecution may file additional, specified charges or enhancements, particularly if the case is not resolved before trial. Any such conditions on the waiver should be specifically stated and made a part of the waiver. See Pen C §1009; *People v Winters* (1990) 221 CA3d 997, 1005, 270 CR 740.

[*Mr./Ms.*] [*name of defendant*], have you discussed this waiver with your attorney?

Do you understand the conditions that [*your lawyer/the prosecutor*] has stated here as a part of the agreement?

Do you have questions about those conditions?

[*To prosecutor*]

[*Mr./Ms.*] [*name of prosecutor*], are the People prepared to waive the preliminary hearing [*on these conditions*]?

(3) *Waiver:*

[*To defendant*]

[*Mr./Ms.*] [*name of defendant*], you have the right to make the prosecution prove in a preliminary hearing in this court that you probably committed the offenses with which you are charged. Do you understand? Do you give up that right?

At the preliminary hearing, you have the right to see and hear any witnesses called by the prosecutor to testify in open court against you and to have your attorney question them. Do you understand that right? Do you give it up?

At the preliminary hearing, you have the right to present evidence on your behalf and to testify if you want to, although no one can make you testify against yourself unless you choose to testify. Do you understand that right? Do you give it up?

Now, if you waive your right to a preliminary hearing, you are giving up all those rights that I just explained. Do you understand? Do you have questions?

If you give up those rights, you will be bound over for trial and will be charged with all those offenses that you are now accused of [*and any additional charges that were included in the conditions on the waiver*]. Once those charges are filed, your case will proceed to trial. Do you understand?

Do you have any questions about the rights you are giving up or what will happen if you waive this preliminary hearing?

Has anyone threatened you in any way to make you do this?

Has anyone promised you anything, other than what we have just discussed here in open court?

So having all that in mind, do you wish to give up all these rights that I have explained?

Counsel, is this waiver made with your consent?

Do the People also waive their right to a preliminary hearing?

(4) *Taking the waiver:*

[*Mr./Ms.*] [*name of defendant*], do you give up your right to have a preliminary hearing in Case Number _____?

As part of this waiver, do you also agree that the prosecutor may accuse you of the following additional offenses if this matter is not resolved before trial?

Do counsel for both parties agree to the waiver?

(5) *Finding:*

I find defendant knows and understands [*his/her*] rights, the agreement's terms, and the waiver's consequences. I further find that defendant has freely, voluntarily, and intelligently waived those rights.

(6) *Order:*

Accordingly, defendant is certified to this court under the order I am now signing. Defendant is directed to appear in Department _____ on [*date*], at [*time*]. [*Defendant may remain on bail in the sum previously posed/may be admitted to bail in the amount of $*_____].

B. [§92.113] Script: Waiver of One-Session Rule

(1) *Advisement:*

[*This waiver must be personally taken from defendant*]

[*Mr./Ms.*] [*name of defendant*], you have the right to have your preliminary hearing held in one continuous session. That means you have the right to have me work on your case and no other, except for attending to brief court matters that may require my attention, until your case is completed. If we do not finish your case by the end of the court day, you have the right to have us begin with your case first thing tomorrow and each full court day after that until your case is finished. Do you understand?

(2) *Waiver:*

Your lawyer is advising that you give up that right. Do you understand? Do you have any questions about the right you are being asked to give up? Do you give up that right?

[*Defendant responds*]

Counsel, is this waiver with your consent?

[*Counsel responds*]

The court finds that defendant's waiver of the right to a continuous, one-session preliminary hearing is freely, knowingly, and intelligently made and thus accepts the waiver.

C. [§92.114] Script: Taking Plea at Preliminary Hearing

(1) *Call the case:*

Clerk: Calling the matter of the People of the State of California versus [*name of defendant*].

[*To defendant*]

Clerk: Is that your true name, [*Sir/Madam*]?

Clerk: [*Mr./Ms.*] [*name of defendant*] is being charged with [*state charges in complaint.*]

(2) *Proposed Plea:*

[*Mr./Ms.*] [*name of defendant*], I understand that an agreement has been reached in this case. Please turn your attention to the prosecutor. [*He/She*] will state what will happen to you if you plead guilty/no contest in this case.

[*Prosecutor states charges and conditions*]

[*Mr./Ms.*] [*name of defendant*], did you understand everything that's been said?

[*Defendant responds*]

(3) *Waiver:*

Are these the terms and conditions upon which you are willing to plead guilty/no contest?

[*Defendant responds*]

Has anyone made any promises other than those made here in open court in order to get you to plead guilty/no contest?

[*Defendant responds*]

Has anyone threatened you or forced you to plead guilty/no contest?

[*Defendant responds*]

Are you under the influence of alcohol or any drug, narcotic, or medication?

[*Defendant responds*]

[*For no-contest plea*]

Your no-contest plea(s) will have the same force and effect as pleading guilty. If you plead no contest, I will find you guilty. Do you understand?

[*Defendant responds*]

Is there a factual basis for this plea, Counsel?

[*Prosecutor and defense counsel respond*]

If you are not a United States citizen, you should assume that your plea will result in your deportation, exclusion from reentry to the United States, and denial of naturalization under United States law. Do you understand?

[*Defendant responds*]

As a direct result of this plea [*summarize plea agreement*],

[*Add if subject to four-way search clause*]

you will have to make your person, your residence, any personal property under your immediate control, and any vehicle under your control, subject to search, night or day, with or without probable cause. The search can be conducted by a peace officer or probation officer.

You will have to pay a restitution fine of not less than $300 and not more than $10,000,

[*Add if probation is to be granted*]

In addition, the court will order a separate probation revocation restitution fine in the same amount as the restitution fine. This fine will be stayed pending your successful completion of probation, when it will be permanently stayed. However, if you violate probation, the stay will be lifted and you will have to pay this fine. Do you understand?

[*Add if sentenced to postrelease community supervision*]

Moreover, the court will order a separate postrelease community supervision restitution fine in the same amount as the restitution fine. This fine will be stayed pending your successful completion of

postrelease community supervision, when it will be permanently stayed. However, if you violate postrelease community supervision, the stay will be lifted and you will have to pay this fine.

[*Add if sentenced to state prison*]

The court will also order a separate parole revocation restitution fine in the same amount as the restitution fine. This fine will be stayed pending your successful completion of parole, when it will be permanently stayed. However, if you violate parole then the stay will be lifted and you will have to pay this fine. Do you understand?

[*Defendant responds*]

[*Add if crime with a victim*]

You will have to pay restitution to the victim(s) on all [*number of counts*] counts charged in an amount determined by the court to fully reimburse the victim(s) for economic losses. Do you understand?

[*Defendant responds*]

Do you give up your right to appeal this conviction?

[*Defendant responds*]

Do you give up your right to make any motions in this case?

[*Defendant responds*]

If you violate the terms and conditions of probation, you could be sentenced to [*state consequences of violation*]. If you were sent to state prison, upon your release after serving your sentence, you would be placed on supervised parole. There would be terms and conditions of parole. If you violated parole, you would be sent back to state prison for up to 1 year for each such violation. Do you understand?

[*Defendant responds*]

Do you understand that another judge will be sentencing you?

[*Defendant responds*]

Do you understand that the conditional plea(s) we have discussed will not be binding on the sentencing judge? If that judge disapproves of the plea(s) and conditions, you will be permitted to withdraw your plea(s) of [*guilty/no contest*], your not-guilty plea will be reentered, all dismissed

charges will be reinstated, and your case will be scheduled for a preliminary hearing.

[*Defendant responds*]

You have certain rights as a defendant, including the right to a preliminary examination. That's a hearing before the court where the prosecutor presents evidence. You, through your attorney, can also present evidence. The judge then decides if there's sufficient basis to believe a crime has been committed and that you committed it. If the judge so decides, you will be held to answer to the charge or charges for trial. If the judge decides otherwise, you will be discharged or released. Do you understand that you have a right to a preliminary examination?

[*Defendant responds*]

At that preliminary examination, you have the right to confront and cross-examine witnesses against you. You have the right to have an attorney to assist you. You can bring in witnesses who will testify for you. It doesn't cost you money. You can use the court's subpoena power. You can testify at that hearing or you can remain silent and not incriminate yourself. Do you understand these rights at your preliminary examination?

[*Defendant responds*]

If you plead guilty/no contest today, you will give up your right to a preliminary examination together with the other rights described. Do you understand?

[*Defendant responds*]

Do you give up your right to a preliminary examination, together with the other rights described?

[*Defendant responds*]

You also have a right to have a trial by judge or by jury, and at that trial, you can exercise the rights I described earlier. You can confront and cross-examine witnesses, and bring in witnesses who will testify for you and have the assistance of the court in ordering those witnesses to come to court. You can testify at trial or you can remain silent and not incriminate yourself. Do you understand that you have the right to trial, together with these other rights described?

[*Defendant responds*]

If you plead no contest today, you will give up your right to trial, together with these other rights described. Do you understand?

[*Defendant responds*]

Do you give up your right to trial, together with the other rights described?

[*Defendant responds*]

What is your plea to [*state violation*]?

[*Defendant responds*]

[*Or if there is more than one count*]

What is your plea to [*state violation*], as described in Count 1 of this Complaint?

[*Add requests for plea for each additional count*]

[*Defendant responds*]

[*If there are enhancements or priors*]

Do you admit the [*state enhancement and/or prior conviction*] as to Count(s) ___?

(4) *Findings:*

I find that you have been fully informed of your rights. You understand them and have waived them knowingly, freely, voluntarily, and intelligently. I find that you've been fully informed of the consequences of your plea. You do understand what's going to happen?

I find a factual basis for your plea, and I accept it and I find you guilty [*and I find the [enhancement and/or prior conviction] to be true*]. [*Add any changes in the complaint, e.g., I dismiss Counts 3 and 4, pursuant to the negotiated disposition.*]

(5) *Post Plea Orders*

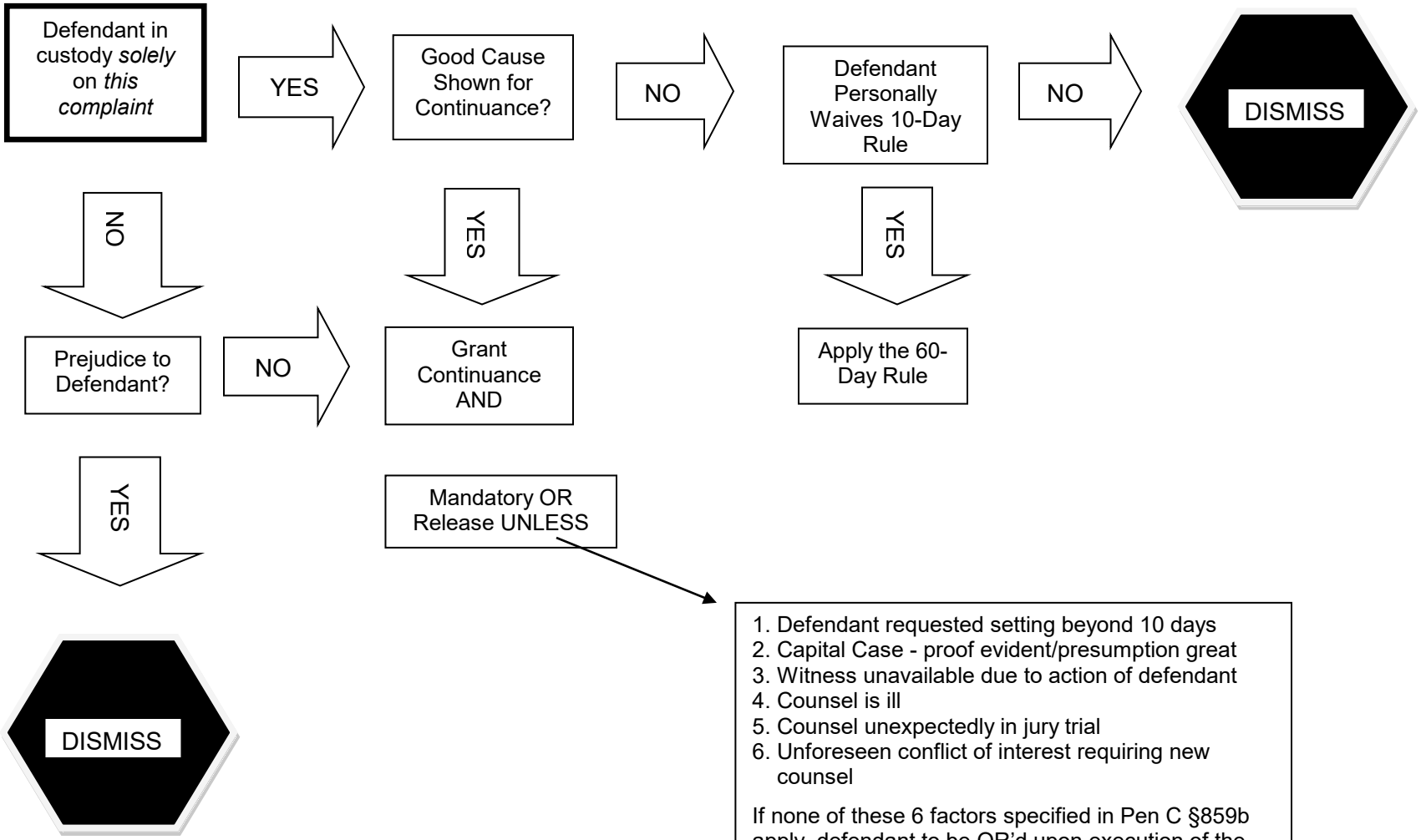
I certify the case to the Superior Court and set pronouncement of judgment at [*time*] in Department ___ on [*date*]. The matter is referred to the Probation Department to prepare a presentence report.

[*If the plea agreement indicates immediate sentencing*]

The plea agreement contemplates immediate sentencing. You understand that you have a right to have this matter certified to the Superior Court and to have a presentence report prepared in this matter? Do you waive these rights and ask this court to sentence you now under the plea agreement?

[*Proceed to pronouncement of judgment*]

Appendix: Operation of the 10-Day Rule



1. Defendant requested setting beyond 10 days
2. Capital Case - proof evident/presumption great
3. Witness unavailable due to action of defendant
4. Counsel is ill
5. Counsel unexpectedly in jury trial
6. Unforeseen conflict of interest requiring new counsel

If none of these 6 factors specified in Pen C §859b apply, defendant to be OR'd upon execution of the written OR release agreement required by Pen C §1318.

Table of Statutes

Table of Cases