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California -

SELECT COMMITTEE ON TRIAL COURT DELAY

REPORT 3

Expand the Infraction Category of Public Offenses

Revise the Voir Dire Procedure for Selection of a Criminal Jury

Reduce Jury Size in Selected Criminal Cases

Revise the Number of Available Peremptory Challenges in Criminal Cases

Institute Statewide Uniformity in Certain Aspects of Jury Service in Criminal Cases

Authorize Majority Verdicts in Selected Criminal Cases

Require Certification of Counsel for Participation in Felony Trial Proceedings

Enact an Alibi Statute

Transfer Selected Criminal Prosecutions from the Superior Court to the Municipal or Justice Court

February, 1972

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Select Committee on Trial Court Delay
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THE WORK OF THE SELECT COMMITTEE ON TRIAL COURT DELAY

The Committee was appointed by Chief Justice Donald R. Wright on March 26, 1971 to investigate the causes of trial court delay in California, and between now and May 1, 1972, it will recommend solutions to the people of California and the public officials concerned with our system of justice. For these purposes the Committee has formed the following Subcommittees:

Civil	Judge William M. Gallagher (Chairman) Bennett W. Priest George R. McClenahan
Penal	Judge Charles H. Older (Chairman) Loren A. Beckley Wayne H. Bornhoft
Court Administration	Judge Homer B. Thompson (Chairman) John H. Finger George M. Murchison

The Committee is assisted in its deliberations by the following officials designated by their respective governmental bodies to participate in the Committee's deliberations: Senator Robert Lagomarsino; Assemblyman Jack Fenton; and Mr. Herbert Ellingwood, Legal Affairs Secretary to the Governor of California.

The Committee also is assisted by a fulltime professional staff: Larry L. Sipes, Director and Counsel to the Court Administration Subcommittee; Patrick J. Clark, Counsel to the Penal Subcommittee; and Charles G. McBurney, Counsel to the Civil Subcommittee. In addition, expert consultants are retained for any needed assistance.

This third report contains proposals which would allow the judicial system to effectively cope with some of the current congestion problems which affect the administration of criminal justice. The Committee believes that implementation of the following proposals would serve the interests of the public and the individual defendant by effectuating the prompt and fair disposition of each criminal case. The Committee was assisted in the preparation of these proposals by staff-prepared background materials and a consultant's report by attorney Stanley Friedman on infractions, as well as by the experience and expertise of the Committee members and advisors. In addition, no proposal was submitted for consideration by the full Committee until it had been evaluated by the appropriate Subcommittee and recommended for full Com-

mittee approval. Although confronted with a one year deadline, the Committee in this manner intends to assure that each improvement it recommends is preceded by thorough and informed deliberations.

The Committee acknowledges with appreciation that its operations are funded by the Law Enforcement Assistance Administration through a grant by the California Council on Criminal Justice, supplemented to the extent of 10% by State funds.

RECOMMENDATIONS

EXPAND THE INFRACTION CATEGORY OF PUBLIC OFFENSES

Moving traffic violations of a non-serious nature, presently classified as misdemeanors, should be reclassified as infractions.

REVISE THE VOIR DIRE PROCEDURE FOR SELECTION OF A CRIMINAL JURY

Legislation should be enacted authorizing the voir dire questioning of prospective jurors exclusively by the trial judge in his discretion in criminal jury trials.

REDUCE JURY SIZE IN SELECTED CRIMINAL CASES

A criminal jury should be composed of twelve people in both the guilt and penalty phases of those felony prosecutions where an alleged offense is punishable with death, and in those felony prosecutions where an alleged offense is punishable with a maximum sentence of life imprisonment; a criminal jury should be composed of six people in those felony prosecutions where an alleged offense is neither punishable with death nor with a maximum sentence of life imprisonment; and a criminal jury should be composed of six people where the alleged offense is prosecuted as a misdemeanor.

A reduction in jury size from twelve members should be permitted during the course of a criminal trial, where a jury member has died or is discharged for illness or other good cause, in felony prosecutions where the maximum punishment for the alleged felony offense is life imprisonment, provided the number of jurors is not ultimately reduced below nine.

REVISE THE NUMBER OF AVAILABLE PEREMPTORY CHALLENGES IN CRIMINAL CASES

In criminal cases with a single defendant, the prosecution and the defense should each be entitled to a maximum number of twelve peremptory challenges in those prosecutions where an alleged offense is punishable with death or with a maximum sentence of life imprisonment; the prosecution and the defense should each be entitled to a maximum number of six peremptory challenges in such prosecutions where an alleged offense is neither punishable with death nor with a maximum sentence of life imprisonment.

In criminal cases with multiple defendants, the defense should be entitled to twenty-four peremptory challenges in those prosecutions where an alleged offense is punishable with death or with a maximum sentence of life imprisonment, with the twenty-four challenges to be divided equally among the defendants, provided that each defendant should be entitled to a minimum of five such challenges, and the prosecution should be entitled to the number of challenges equal to the total number to which the defendants are entitled; in criminal cases with multiple defendants, the defense should be entitled to twelve peremptory challenges in those prosecutions where an alleged offense is punishable neither with death nor with a maximum sentence of life imprisonment, with the twelve challenges to be divided equally among the defendants, provided that each defendant should be entitled to a minimum of five such challenges, and the prosecution should be entitled to the number of challenges equal to the total number to which the defendants are entitled.

INSTITUTE STATEWIDE UNIFORMITY IN CERTAIN ASPECTS OF JURY SERVICE IN CRIMINAL CASES

Jurors should be called for service at random from the list of registered voters in each county.

A person called for jury service should be obligated to serve in one trial until completion or make four appearances, following which his name would be removed from the jury list for three years if he so requested.

Exemption from jury service should be reduced to an absolute minimum by excusing a juror only in a case of extreme, serious hardship and then only if recommended by an official designated by the Presiding Judge and approved by the Presiding Judge, or another judge designated by him.

Jurors should be compensated at the rate of $20.00 per day for each day they report; they should be reimbursed for the cost of transportation at the rate of 15 cents per mile each way to and from their homes; and they should be furnished with free parking or be reimbursed for the expense of parking.

Adequate jury assembly rooms should be furnished in which juror orientation is conducted and which, at a minimum, are provided with comfortable furniture, reading materials, access to food and beverages, rest rooms, public telephones, cards and other games, and television or radio.

A system should be instituted whereby a juror may volunteer to be available on one-hour notice by telephone, in which case he would not be obligated to actually appear in court until so notified.

AUTHORIZE MAJORITY VERDICTS IN SELECTED CRIMINAL CASES

A unanimous verdict should be required in both the guilt and penalty phases of those felony prosecutions where the alleged offense is punishable with death; however, a five-sixths majority of the jurors should be sufficient to return a verdict in those felony prosecutions where the alleged offense is not punishable with death, and in those prosecutions where the alleged offense is a misdemeanor.

REQUIRE CERTIFICATION OF COUNSEL FOR PARTICIPATION IN FELONY TRIAL PROCEEDINGS

A commission should be created to establish and administer a compulsory certification program for counsel who participate in felony trial proceedings, and to implement a decertification procedure for those certified counsel who subsequently demonstrate a lack of professional qualifications.

ENACT AN ALIBI STATUTE

A statutory procedure should be enacted to regulate mutual pretrial disclosure of the identity of witnesses who are expected to contradict or support an alibi defense at trial.

TRANSFER SELECTED CRIMINAL PROSECUTIONS FROM THE SUPERIOR COURT TO THE MUNICIPAL OR JUSTICE COURT

Superior Court judges should be given the discretion, upon the making of a motion pursuant to California Penal Code Section 995, to transfer an alternate felony-misdemeanor offense to the appropriate Municipal or Justice Court for prosecution as a misdemeanor if in the opinion of the Superior Court Judge the offense should be determined to be a misdemeanor by way of sentence in the event of a conviction or change of plea.

COMMENTS

EXPAND THE INFRACTION CATEGORY OF PUBLIC OFFENSES

California Penal Code Section 16 divides crimes into three categories, namely felonies, misdemeanors, and infractions. A public offense which has been categorized as an infraction is deemed to be a relatively minimal violation in terms of the type of harm involved and its impact on the public. Due to its petty nature, an infraction is not punishable with imprisonment. Since a defendant convicted of an infraction may not be incarcerated, public policy considerations have dictated that a person charged with an infraction is not entitled to a jury trial or to be represented by the public defender or other counsel appointed at public expense.

Judicial efficiency is a major impetus for reclassifying certain minor misdemeanor offenses as infractions. The use of jury trials in connection with minor violations currently consumes courtroom time which could more appropriately be used for the disposition of serious public offenses and the litigation of civil disputes. Eliminating jury trials in these cases would substantially alleviate court congestion in California. Although this suggestion may seem to conflict with traditional concepts of justice in which we presume that anyone charged with a criminal violation should have the right to a jury trial, it appears reasonable to conclude that the option to demand a jury trial is not necessary where the accused is not faced with imprisonment and has the right to be tried before an impartial judge with the availability of review upon appeal. This is particularly evident in light of the significant saving in court time which results when such minor offenses are tried before a judge rather than a jury.

A number of minor traffic violations are amenable to reclasssification as infractions. California Vehicle Code Section 40000 presently categorizes parking, equipment and other minor vehicle violations as infractions. However, a number of traffic violations are presently classified as misdemeanors. The Committee recommends that:

> **Moving traffic violations of a non-serious nature, presently classified as misdemeanors, should be reclassified as infractions.**

The Committee has concluded Section 40000 should be amended so that the infractions classification would be extended to cover all but the more serious violations of the rules of the road contained in Division 11 of the Vehicle Code. Among the traffic regulations which would thereby be reclassified are those pertaining to overtaking other vehicles, and compliance with traffic signs, speed laws, and rights-of-

way. It is felt that the attachment of relatively slight penalties to such offenses is warranted when compared to the much higher cost to the State in terms of money and time when prosecuting such offenses and providing a jury trial and appointed counsel.

This recommendation recognizes that certain traffic violations pose a substantial danger to the public and should continue to be classified as misdemeanors. Such violations as driving under the influence of an intoxicant and reckless driving constitute serious threats to the public safety and warrant the available sanction of imprisonment. Additionally, the Committee recognizes that chronic violators of minor vehicle regulations thereby indicate a deliberate disregard for public safety. Such conduct indicates that less serious sanctions, such as fines and attendance at traffic school, would not serve as sufficient deterrents. Thus, if a defendant has been convicted of three or more traffic infractions within a preceding twelve month period, a subsequent violation which would normally have been treated as an infraction should instead be deemed a misdemeanor if the prior violations are alleged in the accusatory pleading.

The Committee therefore recommends that California Vehicle Code Section 40000 be amended to provide as follows:

> 40000. Except as provided in this section, it is unlawful and constitutes an infraction for any person to violate, or to fail to comply with, any provision of this code, or any local ordinance adopted pursuant to this code.
>
> (a) A violation expressly declared to be a felony, or a public offense which is punishable, in the discretion of the court, either as a felony or misdemeanor, or a wilful violation of a court order which is punishable as contempt pursuant to subdivision (a) of Section 42003 is not an infraction.
>
> (b) A violation of any of the following provisions, constitutes a misdemeanor:
>
> Section 20, relating to false statements.
> Section 27, relating to impersonating a member of the California Highway Patrol.
> Section 31, relating to giving false information.
> Section 2800, relating to failure to obey an officer's lawful order or submit to a lawful inspection.
> Section 2801, relating to failure to obey a fireman's lawful order.
> Section 2803, relating to unlawful vehicle or load.
> Section 2815, relating to failure to obey a crossing guard's traffic signal or direction.

> Section 5901, relating to dealers giving notice.
> Section 10501, relating to false report of vehicle theft.
> Sections 10750 and 10751, relating to altered or defaced vehicle identifying numbers.
> Section 10851.5, relating to theft of binder chains.
> Sections 10852 and 10853, relating to injuring or tampering with a vehicle.
> Section 10854, relating to unlawful use of stored vehicle.
> Division 5 (commencing with Section 11100), relating to occupational licensing and business regulations.
> Section 12500, subdivision (a), relating to unlicensed drivers.
> Section 12951, subdivision (b), relating to refusal to display license.
> Section 13004, relating to unlawful use of identification card.
> Section 14601, relating to driving when suspended.
> Section 14601.1, relating to driving when suspended.
> Section 14610, relating to unlawful use of driver's license.
> Section 15501, relating to use of false or fraudulent license by minor.
> Section 16560, relating to interstate highway carriers.
> Section 20002, relating to duties at accidents.
> Sections 23102 and 23102.5, relating to driving under the influence.
> Section 23103 and 23104, relating to reckless driving.
> Section 23106, relating to driving under the influence.
> Section 23109, relating to speed contests or exhibitions.
> Section 23110, subdivision (a), relating to throwing at vehicles.
> Section 23253, relating to officers on vehicular crossings.
> Section 23332, relating to trespassing.
> Division 14 (commencing with Section 31600), relating to transportation of explosives.
> Division 14.5 (commencing with Section 33000), relating to transportation of radioactive materials.
> Division 14.7 (commencing with Section 34001), relating to flammable liquids.
> Section 34506, subdivision (a), relating to transportation of hazardous materials.
> Section 40005, relating to owner's responsibility.
> Section 40504, relating to false signatures.
> Section 40508, relating to failure to appear or to pay fine.
> Section 40519, relating to failure to appear.
> Section 42005, relating to failure to attend traffic school.

(c) Any offense which would otherwise be an infraction is a misdemeanor if a defendant has been convicted of three or more violations of this code or any local ordinance adopted pursuant to this code within the 12-month period immediately preceding the commission of the offense and such prior convictions are alleged in the accusatory pleading. For this purpose a bail forfeiture shall be deemed to be a conviction of the offense charged.

REVISE THE VOIR DIRE PROCEDURE FOR SELECTION OF A CRIMINAL JURY

The Committee has concluded that the Rules of Court recently adopted by the Judicial Council with respect to voir dire examination of jurors in civil cases should be made applicable to criminal cases insofar as appropriate legislation would specifically grant the trial judge discretion to regulate the selection of a criminal jury. It is felt that such discretion would eliminate certain voir dire excesses and thereby expedite the judicial process. The Committee therefore recommends that:

> **Legislation should be enacted authorizing the voir dire questioning of prospective jurors exclusively by the trial judge in his discretion in criminal jury trials.**

Pursuant to this recommendation, California Penal Code Section 1078 should be amended to provide as follows:

> 1078. In criminal jury trials, the trial judge shall examine the prospective jurors to select a fair and impartial jury. He shall permit counsel for each party to submit additional written questions which he shall put to the jurors as he deems proper, or for good cause, he may permit counsel to supplement the trial judge's oral examination within limits prescribed by him.

This procedure would encourage a more efficient method of jury selection. The trial judge could confer with counsel prior to trial and select appropriate questions in light of the circumstances of each particular case. Courtroom delays resulting from objections to proffered questions would be eliminated without impairing the selection of a fair and impartial jury. The occasional conscious or unconscious tendencies of counsel in our adversary system to improperly pre-instruct on the law, to indoctrinate the jury, and to explore other improper areas and subjects also would be eliminated.

The trial judge would be allowed to foreclose oral questioning of prospective jurors by counsel. However, the judge could permit such questioning if the circumstances of the particular case indicated that

oral questioning by counsel would expedite the proceedings by assisting the court in selecting an impartial jury.

The California Judicial Council has adopted rules that would apply a similar procedure to jury selection in civil cases. The Judicial Council concluded that such a method would expedite the jury selection process without impairing the right of litigants to a fair and impartial jury. The Committee has concluded that the same rationale is persuasive in criminal as well as civil jury trials.

REDUCE JURY SIZE IN SELECTED CRIMINAL CASES

Traditionally, twelve people have been selected in criminal cases to collectively serve as a jury. However, the United States Supreme Court has recently held that a jury of six people is constitutionally sufficient in a criminal trial.* The Committee has therefore concluded that the number of jurors should be adjusted to reflect the seriousness of the offense and recommends that:

> **A criminal jury should be composed of twelve people in both the guilt and penalty phases of those felony prosecutions where an alleged offense is punishable with death, and in those felony prosecutions where an alleged offense is punishable with a maximum sentence of life imprisonment; a criminal jury should be composed of six people in those felony prosecutions where an alleged offense is neither punishable with death nor with a maximum sentence of life imprisonment; and a criminal jury should be composed of six people where the alleged offense is prosecuted as a misdemeanor.**

The use of smaller juries in selected criminal cases would allow the judicial system to maximize the use of existing resources by contributing to time and cost efficiency. The present congestion in California trial courts would be curtailed since the resultant time saving would allow more criminal cases to be decided in accordance with the constitutional provisions regarding a speedy trial. Thus, the public policy encouraging the prompt disposition of criminal cases could be more effectively accomplished with the use of smaller juries. At the same time, a six-member jury could reliably perform its fact-finding function in reaching a verdict while retaining the fundamental safeguards for both the defendant and the people.

In recommending that the jury be composed of twelve people in those felony prosecutions where an alleged offense is punishable with a maximum sentence of life imprisonment, but not death, the Committee has further concluded that the trial in such cases should continue where

* *Williams v. Florida* (1970), 399 U.S. 78, 26 L.Ed.2d 446, 90 S. Ct. 1893.

a jury member has died or has been discharged for illness or any other valid reason, providing the number of remaining jurors is not reduced below nine. Therefore, the Committee also recommends that:

A reduction in jury size from twelve members should be permitted during the course of a criminal trial, where a jury member has died or is discharged for illness or for other good cause, in felony prosecutions where the maximum punishment for the alleged felony offense is life imprisonment, provided the number of jurors is not ultimately reduced below nine.

This provision would reduce, if not eliminate, the need for alternate jurors in such cases. The jury would normally be composed of twelve members but the trial could continue provided not more than three of the original twelve jurors were incapable of hearing the entire case.

In accordance with the aforementioned recommendations, the Committee proposes that the following statutory amendments to the California Penal Code be made:

1. Section 1046 of the Penal Code be amended to read:
   1046.
   (a) Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.
   (b) The number of trial jurors shall be 12 in felony cases where a capital offense is charged.
   (c) The number of trial jurors shall be 12 in felony cases where the maximum punishment is life imprisonment. However, where in the course of such felony cases any member of the jury dies or is discharged by the court due either to illness rendering such member incapable of continuing to act or for any other good cause, but the number of its members is not reduced below 9, the jury shall nevertheless be considered as remaining and properly constituted for all the purposes of that trial and the trial shall proceed and a verdict may be given accordingly.
   (d) The number of trial jurors shall be 6 in felony cases which are not punishable as capital offenses or with a maximum sentence of life imprisonment.
   (e) The number of trial jurors shall be 6 in misdemeanor cases.
2. Section 1123 of the Penal Code be amended to read:
   1123.
   If before the jury has returned its verdict into court, a juror becomes sick or upon other good cause shown to the court is found to be unable to perform his duty, the court may order

him to be discharged. If any alternate jurors have been selected as provided by law, one of them shall be designated by the court to take the place of the juror so discharged. Except as provided in Section 1046 (c) of this Code, if after all alternate jurors have been made regular jurors, or if there be no alternate juror, a juror becomes sick or otherwise unable to perform his duty and has been discharged by the court as provided herein, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may be again tried.

REVISE THE NUMBER OF AVAILABLE PEREMPTORY CHALLENGES IN CRIMINAL CASES

The Committee has reviewed the use of peremptory challenges to prospective jurors and has decided that the number of these challenges available in criminal cases should be revised to meet the practical needs of each party while allowing the most efficient use of judicial resources. It is believed that the number of peremptory challenges should depend upon the seriousness of the charge and the number of defendants being prosecuted in each criminal action. Pursuant to these guidelines, the Committee recommends that:

In criminal cases with a single defendant, the prosecution and the defense should each be entitled to a maximum number of twelve peremptory challenges in those prosecutions where an alleged offense is punishable with death or with a maximum sentence of life imprisonment; the prosecution and the defense should each be entitled to a maximum number of six peremptory challenges in such prosecutions where an alleged offense is neither punishable with death nor with a maximum sentence of life imprisonment.

The peremptory challenge is an important trial mechanism for both the State and the defendant since it enables either party to remove from the jury a person who has been unsuccessfully challenged for cause or any person whom either party may desire to excuse without the necessity of declaring a reason. At the same time it is necessary to limit the number of these challenges to avoid unnecessarily extended trials. The purpose of the jury selection process is to eliminate persons disqualified by law and to obtain a fair and impartial jury. The Committee believes that this recommendation would encourage the attainment of such purposes. Under the recommended changes each party could still excuse those prospective jurors who appear unduly sympathetic to the cause of the other party.

The recommended number of peremptory challenges corresponds with the number of jurors suggested by the Committee in its previous

recommendation in the report dealing with jury size. Thus, where there are twelve jurors, each party should be allowed twelve peremptory challenges, while where there are six jurors each side should be allowed six peremptory challenges. In most cases the proposed recommendation would result in a higher ratio of peremptory challenges to the size of the jury than is the case under the present system. The availability of one peremptory challenge for each juror to be seated in the particular case is reasonable in the view of the Committee, especially in light of the unlimited number of challenges for cause permitted each party in a criminal case.

Consolidating the recommendations regarding jury size and the number of peremptory challenges available to the prosecution and the defense in criminal cases with a single defendant produces the following rules:

Offense	*Jury size*	*Number of Peremptory Challenges*
Felony offenses punishable with death	12	12
Felony offenses punishable with a maximum sentence of life imprisonment	12	12
Felony offenses not punishable with death or a maximum sentence of life imprisonment	6	6
Misdemeanor offenses	6	6

In criminal cases with multiple defendants, the number of peremptory challenges should likewise correspond to the seriousness of the offense. The Committee further recommends that:

In criminal cases with multiple defendants, the defense should be entitled to twenty-four peremptory challenges in those prosecutions where an alleged offense is punishable with death or with a maximum sentence of life imprisonment, with the twenty-four challenges to be divided equally among the defendants, provided that each defendant should be entitled to a minimum of five such challenges, and the prosecution should be entitled to the number of challenges equal to the total number to which the defendants are entitled; in criminal cases with multiple defendants, the defense should be entitled to twelve peremptory challenges in those prosecutions where an alleged offense is punishable neither with death nor with a maximum sentence of life imprisonment, with the twelve challenges to be divided equally among the defendants, provided that each defendant should be entitled to a minimum of five such challenges, and the prosecution should be entitled to the number of challenges equal to the total number to which the defendants are entitled.

The implementation of this recommendation would eliminate the use of joint challenges by the defendants. Instead, it would authorize the exclusive use of individual challenges and thereby eliminate conferences and sources of friction among defendants. In most cases, each co-defendant would be entitled to more individual challenges than under the present system and in no event would the number of individual challenges be reduced.

Consolidating the recommendations regarding jury size and the number of peremptory challenges available to the prosecution and the defense in criminal cases with multiple defendants produces the following rules:

Offense	*Jury size*	*Number of Peremptory Challenges*
Felony offenses punishable with death	12	24 (but each defendant entitled to a minimum of 5)
Felony offenses punishable with a maximum sentence of life imprisonment	12	24 (but each defendant entitled to a minimum of 5)
Felony offenses not punishable with death or a maximum sentence of life imprisonment	6	12 (but each defendant entitled to a minimum of 5)
Misdemeanor offenses	6	12 (but each defendant entitled to a minimum of 5)

In summary, a total of twelve or twenty-four peremptory challenges would be allocated to the prosecution and the defense depending upon the seriousness of the criminal charge. However, these numbers would

increase where there are multiple defendants. For example, should seven defendants be charged with a criminal offense which is punishable with a maximum sentence of life imprisonment, the defense and the prosecution would each be entitled to a total of thirty-five challenges since each defendant is entitled to a minimum number of five individual challenges. It is believed by the Committee that the recommended changes regarding peremptory challenges would adequately protect all parties while at the same time permitting the more expeditious selection of a fair and impartial jury.

In accordance with the aforementioned recommendations, the Committee proposes that the following statutory amendments be made:

1. Section 1070 of the Penal Code would be amended to read:

   1070. If the offense charged be punishable with death or with a maximum sentence of imprisonment in the state prison for life, the defendant is entitled to twelve and the state to twelve peremptory challenges. On a trial for any other offense, the defendant is entitled to six and the state to six peremptory challenges.

2. Section 1070.5 of the Penal Code would be amended to read:

   1070.5. When two or more defendants are jointly tried for a public offense punishable with death or with a maximum sentence of imprisonment in the state prison for life, the defendants shall be entitled to twenty-four peremptory challenges to be divided equally among the defendants so that the number of defendants shall be divided into the twenty-four and each defendant shall receive the number of challenges equal to that quotient without any remainder, but in no event shall each defendant be entitled to less than five such challenges. When two or more defendants are jointly tried for any other public offense, the defendants shall be entitled to twelve peremptory challenges to be divided equally among the defendants so that the number of defendants shall be divided into the twelve and each defendant shall receive the number of challenges equal to that quotient without any remainder, but in no event shall each defendant be entitled to less than five such challenges. Each defendant shall exercise such challenges individually and not jointly. In each case where two or more defendants are jointly tried for any public offense, the state shall be entitled to the number of peremptory challenges equal to the total number of all the peremptory challenges to which the defendants shall be entitled.

INSTITUTE STATEWIDE UNIFORMITY IN CERTAIN ASPECTS OF JURY SERVICE IN CRIMINAL CASES

The Committee has concluded that jury service in criminal cases should be made more attractive and acceptable to a broader base of

citizens, thereby encouraging the use of jury panels that are more representative of the various communities. It is therefore recommended that there be statewide uniformity in the following aspects of jury service in criminal cases:

> **Jurors should be called for service at random from the list of registered voters in each county;**
>
> **A person called for jury service should be obligated to serve in one trial until completion or make four appearances, following which his name would be removed from the jury list for three years if he so requested;**
>
> **Exemption from jury service should be reduced to an absolute minimum by excusing a juror only in a case of extreme, serious hardship and then only if recommended by an official designated by the Presiding Judge and approved by the Presiding Judge, or another judge designated by him;**
>
> **Jurors should be compensated at the rate of $20.00 per day for each day they report; they should be reimbursed for the cost of transportation at the rate of 15 cents per mile each way to and from their homes; and they should be furnished with free parking or be reimbursed for the expense of parking.**

To insure further statewide uniformity in certain aspects of jury service in criminal cases, the Committee recommends that the Judicial Council adopt Standards of Judicial Administration directing each county to provide the following services:

> **Adequate jury assembly rooms should be furnished in which juror orientation is conducted and which, at a minimum, are provided with comfortable furniture, reading materials, access to food and beverages, rest rooms, public telephones, cards and other games, and television or radio;**
>
> **A system should be instituted whereby a juror may volunteer to be available on one-hour notice by telephone, in which case he would not be obligated to actually appear in court until so notified.**

The Committee believes that whether or not there is to be a reduction in jury size, there should be an effort to improve the representative nature of the jury panel so that it more closely mirrors the cross-sectional composition of the community. Of course, if jury size is reduced, the need for this improvement is greater. At present, there is no statewide uniformity regarding the qualifications for and exemptions from jury service. Potential jurors are often excluded before they reach the courtroom because they are "working people", housewives with children, students, or the like. The result is often a jury panel composed of retired persons, persons whose employer is willing to continue

their income while they serve as jurors, and others able to shoulder the financial burden of jury service. In short, the present system imposes too great an economic and personal hardship upon individuals to permit a representative cross-section of a community to serve.

The Committee believes that the above recommendations will broaden and improve the representative nature of the jury panel from which individual juries are selected. These recommendations are designed to more equitably distribute the burden of jury service, to reduce the financial burden of jury service, and therefore justifiably to restrict exemption from jury service. Only if potential jurors are called for service from a representative sample of the community, such as the list of registered voters, and only if exemption from jury service is minimized, will the jury panel be most representative of the community and therefore most capable of performing its designated function.

It is the conclusion of the Committee that the aforementioned recommendations regarding uniformity should also apply to jury service in civil cases, and similar recommendations are so stated in Report 5 of the Committee which deals with the civil jury system among other topics.

AUTHORIZE MAJORITY VERDICTS IN SELECTED CRIMINAL CASES

Currently, California law requires that jurors in a criminal case agree unanimously prior to returning a verdict. The Committee has studied the use of unanimous verdicts in criminal cases and has concluded that:

> **A unanimous verdict should be required in both the guilt and penalty phases of those felony prosecutions where the alleged offense is punishable with death; however, a five-sixths majority of the jurors should be sufficient to return a verdict in those felony prosecutions where the alleged offense is not punishable with death, and in those prosecutions where the alleged offense is a misdemeanor.**

If such a majority verdict were returned, the foreman of the jury would announce the verdict in open court and the jury could thereafter be polled at the request of any party.

The Committee has previously recommended in this report that a reduction in jury size to nine members should be permitted under specified circumstances where the maximum punishment for an alleged felony offense was life imprisonment. Without a reduction in size, five-sixths or ten of the jurors could return a verdict. Following a reduction in jury size, where eleven jurors remained and ten of them agreed upon a verdict or where ten jurors remained and nine of them agreed upon a verdict, such a verdict in each case could be accepted without the necessity of unanimity. However, if the jury were reduced to nine people, a unanimous verdict would be required.

In reaching these conclusions regarding majority verdicts, the Committee determined that the necessity of repeating particular trials due to the disagreement of one or two jurors should be eliminated and that duplication would thereby be curbed in the California trial courts.

Consolidating the recommendations regarding jury size and the extent of agreement required by criminal juries produces the following rules:

Offense	*Jury Size*	*Required Agreement Among Jury Members*
Felony offenses punishable with death (both guilt and penalty phases of capital cases)	12	Unanimous
Felony offenses punishable with a maximum sentence of life imprisonment	12 (may be reduced to 9)	Five-sixths or 10 (if reduced, verdicts of 10-1, 9-1, or the unanimous agreement of 9 would be sufficient)
Felony offenses not punishable with death or a maximum sentence of life imprisonment	6	Five-sixths or 5
Misdemeanor offenses	6	Five-sixths or 5

The Committee therefore proposes that the following statutory amendments be made:

1. Section 1147.5 be added to the Penal Code to read:

   1147.5. (a) Except as otherwise provided in this section, the jury may return a verdict only when not less than five-sixths of them agree upon the verdict.

   (b) In capital cases the verdict of the jury shall be unanimous in determining guilt or innocence and in further proceedings on the issue of penalty which are had by the jury under Section 190.1.

   (c) In felony cases where the maximum punishment is life imprisonment, the verdict of the jury need not be unanimous if in such case where there are twelve or eleven jurors, ten of them agree on the verdict; or in such a case where there are ten jurors, nine of them agree on a verdict; however in such a case where there are nine jurors, the verdict of the jury must be unanimous.

   (d) A court shall not accept a majority verdict as provided in this section unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.

2. Section 1163 of the Penal Code be amended to read:

   1163. When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of any party, in which case they shall severally be asked whether it is their verdict, and if the

number of jurors required to return a verdict do not answer in the positive, the jury shall be sent out for further deliberation.

3. Section 1164 of the Penal Code be amended to read:

1164. When the verdict given is such as the court may receive, the clerk, or if there is no clerk, the judge or justice, shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. If the number of jurors required to return the verdict does not agree, the fact shall be entered upon the minutes and the jury again sent out; but if no such disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case.

In addition to statutory changes, an amendment to the California Constitution would be necessary to implement the foregoing recommendations regarding jury size and the use of majority verdicts. Therefore, the Committee recommends that Article I, Section 7 of the California Constitution be amended to read as follows:

Sec. 7. The right of trial by jury shall be secured to all, and remain inviolate.

In criminal actions in which a trial by jury is secured by this section, there shall be twelve jurors in those felony cases punishable as a capital offense or with a maximum punishment of life imprisonment, except that the number of jurors may be reduced to a minimum of nine for good cause as provided by statute in felony cases with a maximum punishment of life imprisonment. There shall be six jurors in felony cases not punishable as a capital offense or with a maximum punishment of life imprisonment. There shall be six jurors in misdemeanor cases.

The Legislature may provide for the number of jurors necessary for a jury to render a verdict in criminal cases, except that in both the guilt and penalty phases of a capital case, a unanimous verdict shall be required.

In those civil actions in which a jury trial is secured by this section, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court, and three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.

REQUIRE CERTIFICATION OF COUNSEL FOR PARTICIPATION IN FELONY TRIAL PROCEEDINGS

Human life and liberty are rights of fundamental importance and deserve the most stringent safeguards against unwarranted infringement.

Since criminal actions directly affect these rights, the Committee believes that only experienced and competent counsel should participate in the more serious penal proceedings, and has concluded that:

A commission should be created to establish and administer a compulsory certification program for counsel who participate in felony trial proceedings, and to implement a decertification procedure for those certified counsel who subsequently demonstrate a lack of professional qualifications.

The Committee agrees in principle that such a commission should be given the authority and direction to establish and implement a certification program for counsel which would establish appropriate qualifications and require that counsel be so certified prior to participating in felony trial proceedings.

The Committee recommends that the commission be composed of attorneys and judges. Such a commission could administer the certification program and establish meaningful procedures whereby trial judges, clients and other interested parties could lodge complaints against certified counsel leading to hearings and appropriate determinations upon such complaints.

There is currently a compelling need for qualified criminal attorneys to assure that the system of criminal justice will operate in an efficient and just manner. This objective is thwarted when incompetent counsel are allowed to participate in serious criminal cases. When experienced and knowledgeable attorneys participate in trial proceedings, such time-consuming procedures as inept presentation of evidence and disruptive tactics are usually eliminated. This in turn decreases the amount of courtroom time devoted to each particular case and allows a larger number of criminal cases to be decided in conformance with the constitutional provisions regarding a speedy trial.

A certification program would not only expedite courtroom proceedings while assuring a just disposition, but would help protect both criminal defendants and the public from ineffective representation by counsel. Currently, unnecessary time is spent both in prolonged trials and retrials following hung juries or appellate reversals. The availability of qualified defense and prosecution counsel would reduce the likelihood of repetitious trials, prolonged incarceration of criminal defendants, and appellate reversals caused by an inadequate trial defense.

The Committee has recommended that only certified attorneys should conduct felony trials and pretrial matters in the Superior Court. However, certification would not be a prerequisite to association with certified counsel in felony trials or such felony pretrial hearings. A distinction between felony and misdemeanor cases has been made

because the more complex and serious cases are felony prosecutions and it is felt that both the public and the individual defendants are entitled to the ablest counsel in these cases.

The Committee has also concluded that a decertification procedure should be established in conjunction with the certification program to assure that only competent attorneys retain their certification. Under this procedure, complaints could be lodged by trial judges, clients and other interested parties against certified counsel on the basis of a demonstrated lack of professional qualifications. This would eliminate the need for periodic re-evaluation of those attorneys who were competent and above reproach.

It is the Committee's expectation that the Legislature would create and that the California State Bar would administer a compulsory certification program that would be meaningful in attacking the problem of trial court delay. However, if such a program could not effectively evolve it is felt that an independent commission should be established to implement the recommended certification program.

ENACT AN ALIBI STATUTE

The Committee has concluded that in the course of pretrial discovery proceedings, the prosecution should be entitled to obtain the names and addresses of defense alibi witnesses, other than the defendant himself, who are expected to testify at trial, and conversely that the defense should be entitled to obtain the names and addresses of prosecution witnesses expected to testify at trial to establish the defendant's presence at the scene of the alleged crime or to rebut the testimony of defense alibi witnesses. This proposal should promote orderly, expeditious and fair determination of criminal charges. It is therefore recommended that:

> **A statutory procedure should be enacted to regulate mutual pretrial disclosure of the identity of witnesses who are expected to contradict or support an alibi defense at trial.**

Such legislation would allow both the prosecution and defense to be thoroughly prepared to litigate a disputed issue as to the defendant's location at the time of the alleged crime.

The enactment of such a statute would expedite courtroom proceedings by obviating the need for continuances or delaying maneuvers to verify the testimony of a witness regarding the defendant's presence or absence at the scene of the alleged crime. The need for unnecessarily extended cross-examination would be eliminated by allowing both the prosecution and defense to investigate this issue prior to trial. In the absence of such a statute, counsel frequently is required to extend his cross-examination due to the element of surprise such testimony may inject into the trial. In addition, this proposal might obviate the need

for a trial in certain cases should pretrial investigation establish the accuracy and reliability of a prospective witness.

The Committee, for these reasons, urges adoption of a new Section 1028 in the Penal Code to provide as follows:

> 1028. As used in this chapter, "alibi evidence" means evidence that the defendant in a criminal action was, at the time specified in the demand for a notice of alibi, at a place other than the place specified in the demand; but "alibi evidence" does not include testimony of the defendant himself as to an alibi.
>
> 1028.1. Not less than 15 days before the day set for the omnibus hearing, the prosecuting attorney may serve on the defendant or his attorney and file a demand that the defendant serve and file a notice of alibi if the defendant is to rely in any way upon alibi evidence at the trial. The demand shall:
>
> (a) State the time and place that the prosecuting attorney intends to establish at the trial as the time when and place where the defendant participated in or committed the crime. If the prosecuting attorney intends to establish more than one time and place where the defendant participated in or committed the crime, the demand shall state each such time and place.
>
> (b) State the name and residence or business address of each witness upon whom the prosecuting attorney intends to rely to establish the defendant's presence at each time and place specified in the demand.
>
> (c) State the defendant is required by Chapter 4.5 (commencing with Section 1028) of Title 6 of Part 2 of the Penal Code to serve and file a notice of alibi if he is to rely in any way upon alibi evidence at the trial.
>
> (d) State that the defendant need not serve or file a notice of alibi if he is to rely only upon his own testimony to establish an alibi.
>
> (e) Be signed by the prosecuting attorney.
>
> 1028.2. If a demand for a notice of alibi is served pursuant to this chapter and the defendant is to rely in any way upon alibi evidence, he shall, not less than 10 days before the day set for the omnibus hearing, serve on the prosecuting attorney and file a notice of alibi which shall:
>
> (a) State the place or places where the defendant claims to have been at the time or times stated in the demand.
>
> (b) State the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence.

(c) State that the prosecuting attorney is required by Chapter 4.5 (commencing with Section 1028) of Title 6 of Part 2 of the Penal Code to serve and file a notice of alibi rebuttal if he is to rely in any way upon further alibi rebuttal evidence at the trial.

(d) Be signed by the defendant or his attorney.

1028.3. If a notice of alibi is served pursuant to this chapter and the prosecuting attorney is to rely in any way upon further evidence to rebut the defendant's alibi evidence, he shall, not less than 5 days before the day set for the omnibus hearing, serve on the defendant or his attorney and file a notice of alibi rebuttal which shall:

(a) State the time and place that the prosecuting attorney intends to establish at the trial as the time when and place where each witness stated in the defendant's notice of alibi was located at the time or times and place or places when the defendant allegedly participated in or committed the crime, provided such time or place differs from the time or place specified by the defendant in the notice of alibi, to discredit such alibi evidence upon which the defendant intends to rely at the trial.

(b) State the name and residence or business address of each witness upon whom the prosecuting attorney intends to rely for rebuttal evidence to discredit the defendant's alibi evidence as provided in subsection (a) above.

(c) Be signed by the prosecuting attorney.

1028.4. At any time before the omnibus hearing, the court before which the criminal action is pending may, in its discretion, upon good cause shown:

(a) Order that the time of service of the notice of alibi or the notice of alibi rebuttal be shortened.

(b) Authorize or require the amendment of the demand for a notice of alibi, or the amendment of the notice of alibi, or the amendment of the notice of alibi rebuttal.

The party who obtains the order shortening the time of service of the notice of alibi or the notice of alibi rebuttal or authorizing or requiring the amendment shall promptly serve a copy of the order on the opposing party.

1028.5. If the defendant serves a notice of alibi, the court may, in its discretion, exclude testimony of a witness offered by the prosecuting attorney to establish the presence of the defendant at a time and place specified in the demand for a notice of alibi unless:

(a) The name and residence or business address of the witness was included in the demand; or

(b) Good cause is shown why the demand failed to include the name and residence or business address of the witness and why the demand was not amended to include such name and address.

1028.6. If a notice of alibi is required to be served by the defendant under this chapter, the court may, in its discretion, exclude alibi evidence offered by the defendant unless:

(a) The information relating to such evidence was included in the notice of alibi as required by Section 1028.2; or

(b) Good cause is shown why the notice of alibi was not served or, if a notice of alibi was served, good cause is shown why it failed to include the information relating to such evidence as required by Section 1028.2 and why it was not amended to include such information.

Nothing in this chapter prevents the defendant from testifying as to an alibi or as to any other matter.

1028.7. If a notice of alibi rebuttal is required to be served by the prosecuting attorney under this chapter, the court may, in its discretion, exclude alibi rebuttal evidence offered by the prosecuting attorney unless:

(a) The information relating to such evidence was included in the notice of alibi rebuttal as required by Section 1028.3; or

(b) Good cause is shown why the notice of alibi rebuttal was not served or, if a notice of alibi rebuttal was served, good cause is shown why it failed to include the information relating to such evidence as required by Section 1028.3 and why it was not amended to include such information.

1028.8. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and residence or business addresses of additional witnesses which come to the attention of either party subsequent to filing their respective lists of witnesses as provided in this Section 1028.

1028.9. If the prosecuting attorney at the trial seeks to establish that the defendant participated in or committed the crime at a time or place other than the time and place specified in the demand for the notice of alibi:

(a) The testimony of a witness offered by the defendant shall not be excluded because the defendant failed to comply with the provisions of this chapter; and

(b) Upon motion of the defendant, the court may grant a continuance as provided in Section 1050.

1028.10. Neither the notice of alibi rebuttal nor the notice of alibi nor the demand for a notice of alibi is admissible as evidence in the criminal action. No reference or comment may be made before the jury concerning:

(a) The contents of a notice of alibi rebuttal or the contents of a notice of alibi or the contents of a demand for a notice of alibi.

(b) Whether or not a notice of alibi rebuttal or a notice of alibi or a demand for a notice of alibi was served and filed.

Nothing in this section is intended to prevent the court from examining a notice of alibi and a notice of alibi rebuttal and demand for a notice of alibi for the purpose of ruling on the exclusion of evidence under this chapter.

TRANSFER SELECTED CRIMINAL PROSECUTIONS FROM THE SUPERIOR COURT TO THE MUNICIPAL OR JUSTICE COURT

The Committee believes an inordinate amount of Superior Court judicial time is devoted to criminal cases which are improperly filed there, and recommends that:

> **Superior Court judges should be given the discretion, upon the making of a motion pursuant to California Penal Code Section 995, to transfer an alternate felony-misdemeanor offense to the appropriate Municipal or Justice Court for prosecution as a misdemeanor if in the opinion of the Superior Court Judge the offense should be determined to be a misdemeanor by way of sentence in the event of a conviction or change of plea.**

California Penal Code Section 995 states the grounds upon which an indictment or information may be set aside. The Committee has concluded that the Superior Court should be allowed further latitude in the disposition of felony prosecutions pursuant to an amended Section 995 pretrial motion in accordance with the aforementioned proposal.

This proposal would allow the Superior Court to make a realistic evaluation of the seriousness of an alleged offense prior to trial, rather than in the sentencing process following conviction. It would thereby discourage the use of time-consuming felony procedures by motivating the district attorney to carefully scrutinize each case and avoid "overcharging." Such a procedure also would protect criminal defendants against unwarranted felony prosecutions, in addition to relieving the

entire court system of the extensive felony process in cases where the more expeditious misdemeanor process was appropriate.

California Penal Code Section 17 allows the court discretion in the disposition and sentencing of a criminal offense that is punishable either as a felony or misdemeanor. However, under existing law the Superior Court can only exercise this discretion during the sentencing phase that follows a conviction in that court. The Committee believes it is anomalous that the Superior Court can impose a misdemeanor sentence following a conviction in Superior Court, can set aside an indictment or information, can dismiss a case on its own motion, but cannot exercise control over the court in which an alternate felony-misdemeanor offense is heard. This anomaly could be eliminated by amending Section 17 to authorize the Superior Court to direct a misdemeanor disposition of a felony allegation prior to trial. The Superior Court would thereby be given authority comparable to that given the magistrate at or before the preliminary examination by Subsection 17 (b) (5).

The Committee therefore recommends that the following legislation be enacted:

1. Penal Code Section 995 be amended to read as follows:

995. (a) The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.
2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.
2. That the defendant had been committed without reasonable or probable cause:

(b) As an alternative to subsection (a) above, an indictment or information pending in a superior court may be removed from the court in which it is pending and the criminal action transferred to the appropriate municipal or justice court if in the opinion of the superior court the criminal action should be sentenced as a misdemeanor violation upon conviction or a change of plea, and provided that the criminal offense is punishable as a felony or misdemeanor pursuant to Section 17 of this Penal Code.

2. Present Penal Code Section 995(a) be renumbered to become Penal Code Section 995.1.

3. Penal Code Section 996 be amended to read as follows:

996. If the motion to set aside the indictment or information, or in the alternative to transfer a criminal action to the appropriate court, is not made, the defendant is precluded from afterwards taking the objections and actions mentioned in Section 995.

4. Penal Code Section 997 be amended to read as follows:

997. The motion must be heard at the time it is made, unless for cause the court postpones the hearing to another time. The court may entertain such motion prior to trial whether or not a plea has been entered and such plea need not be set aside in order to consider the motion. If the motion is denied, and the accused has not previously answered the indictment or information, either by demurring or pleading thereto, he shall immediately do so. If the motion to set aside the indictment or information is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money, or if money has been deposited by another or others instead of bail for his appearance, that the same be refunded to him or to the person or persons found by the court to have deposited said money on behalf of said defendant, unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney; provided, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, if before indictment or information filed he has not been examined and committed by a magistrate.

5. A new subsection 17(b)(6) be added to the Penal Code to read as follows:

17(b)(6). When the Superior Court determines that the offense is a misdemeanor, in which event the case shall be assigned to the appropriate Municipal or Justice Court and within 5 days from such assignment the case shall proceed by arraigning the defendant on an appropriate misdemeanor complaint.

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