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APPEALS  
AND WRITS  

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in CRIMINAL CASES  

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THIRD EDITION

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# APPEALS AND WRITS in CRIMINAL CASES

THIRD EDITION

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# Writs of Mandate and Prohibition Defined

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**§7.1****I. OVERVIEW OF WRITS IN CRIMINAL CASES**

The three principal writs used in criminal law practice are prohibition, mandate (also called mandamus), and habeas corpus. These writs, sometimes called “extraordinary writs” or “prerogative writs,” originated in

England, and were used by the King's Bench, England's supreme common law court, "to supervise inferior officers and tribunals." Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum L Rev 1515, 1533 (2001); *Lewis v Superior Court* (1999) 19 C4th 1232, 1245.

Petitions for writs of prohibition and mandate, discussed in this chapter and in chap 8, are used to request review of rulings made by the trial court or the magistrate during the course of criminal proceedings. The writ of prohibition is used to stop proceedings that are in excess of jurisdiction. CCP §1102. The writ of mandate is used to compel the trial court to perform an act that it is required by law to perform. CCP §1085. Mandate and prohibition are available to both prosecution and defense when the prerequisites for relief are met. See generally, CCP §§1084–1094 (mandate) and 1102–1105 (prohibition).

This chapter will discuss the threshold requirements a petitioner must meet to obtain writ relief; the common uses of mandate and prohibition; and will compare the purposes of the two writs to assist counsel in determining which writ is appropriate in a particular situation. Chapter 8, "Preparing and Opposing Petition for Mandate or Prohibition," provides guidelines for preparing and opposing writ petitions, and includes a number of sample provisions to assist counsel in drafting a petition for extraordinary relief.

The writ of habeas corpus, available only to the defendant, challenges the legality of custody. It can be used pretrial, to challenge excessive bail for example, but its primary purpose is to collaterally attack a judgment or sentence. Habeas corpus in state court is discussed in chaps 9–10. Federal habeas corpus is discussed in chaps 13–18.

The nonstatutory writ of error coram nobis is the equivalent of a motion to vacate the judgment, which is authorized by Pen C §1201.5. See, e.g., *People v Kelly* (1939) 35 CA2d 571. It can be used in circumscribed circumstances to vacate a judgment of conviction after it has been affirmed on appeal when no other remedy is available. See *People v Kim* (2009) 45 C4th 1078. Coram nobis is discussed in chap 11.

Another writ that is rarely utilized in criminal cases, certiorari (review) is discussed in California Civil Writ Practice §§4.10–4.16, 15.27–15.38 (4th ed Cal CEB).

## §7.2 II. JURISDICTION OF COURTS TO CONSIDER WRIT PETITIONS

The courts derive their authority from the constitution, as supplemented by statutes, rules of court, and general principles of law developed in appellate decisions. The California Constitution provides that the California Supreme Court, courts of appeal, and superior courts have original jurisdiction in mandate and prohibition proceedings. Cal Const art VI, §10. Because writs of mandate and prohibition can be issued only to inferior tribunals (CCP §1085(a) (mandate), §1103(a) (prohibition)), the superior court exercises its jurisdiction by issuing a writ to an inferior tribunal, typically a magistrate. A magistrate is a statutory judicial officer whose authority is limited to preliminary matters and whose duties are entirely defined by statute. See Pen C §§806–829, 858–883. A superior court judge sitting as a magistrate is not acting as a judge of the superior court. *People v Toney* (2004) 32 C4th 228, 230 n2; *People v Randall* (1973) 35 CA3d 972, 975. He or she is an “inferior tribunal” to the superior court, which may properly issue writs directed to a magistrate. *People v Superior Court (Chico Feminist Women’s Health Ctr.)* (1986) 187 CA3d 648, 655. Therefore, a writ petition directed to the magistrate who presided at a preliminary hearing in a felony case may be filed in superior court even though the magistrate is a superior court judge. *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 803.

The appellate division of the superior court has original jurisdiction in mandate, and prohibition proceedings in causes subject to its appellate jurisdiction (*i.e.*, cases such as misdemeanors, infractions, and limited civil cases that were tried in municipal court before trial court unification). Cal Const art VI, §10. See also CCP §§1068(b), 1085(b), 1103(b) (defining superior court as “inferior tribunal” to appellate division for purposes of writs of review (certiorari), mandate, and prohibition).

## III. MANDATE AND PROHIBITION COMPARED

### §7.3 A. Difference in Function

Because mandate and prohibition have similar functions, it can sometimes be difficult to determine whether mandate or prohibition is the proper writ to use in a given situation. For example, when the petitioner wants the court to dismiss a case or a count, it is possible to characterize the relief requested as prohibiting the court from proceeding, or compelling the court to dismiss. See, *e.g.*, *Stanton v Superior Court* (1987) 193

CA3d 265, 271 (mandate issued to compel trial court to vacate order denying motion to dismiss). Furthermore, writs of mandate and prohibition have sometimes been used interchangeably.

In some situations, statutes specifically provide that only mandate or prohibition should be used. See, *e.g.*, Pen C §999a (prohibition used to challenge denial of Pen C §995 motion for lack of probable cause). Normally, the prayer for relief should be stated alternatively, allowing the reviewing court to fashion the appropriate remedy. See *McCulloch v Superior Court (Liguori)* (1949) 91 CA2d 641, 642. For example, in *Owens v Superior Court* (1980) 28 C3d 238 (involving a speedy trial violation), a petition for writ of prohibition/mandate was filed and the court directed a peremptory writ of mandate to issue.

#### **§7.4 B. Mislabeling of Writ Will Not Cause Denial of Relief**

A petition for extraordinary writ that mislabels the remedy will not be denied if the petition is otherwise meritorious. *Neal v State* (1960) 55 C2d 11, 15 (mandate unavailable; habeas corpus proper), disapproved on other grounds in *People v Correa* (2012) 54 C4th 331, 334; *Powell v Superior Court* (1957) 48 C2d 704, 705 (prohibition sought; mandate granted); *Jackson v Superior Court* (1983) 140 CA3d 526 (mandate sought; habeas corpus issued); *Jackson v Superior Court* (1980) 110 CA3d 174, 178 (mandate sought; prohibition issued); *In re Geer* (1980) 108 CA3d 1002, 1004 (prohibition, mandate, and habeas corpus sought; mandate issued).

#### **§7.5 C. Concurrent Use of Mandate and Prohibition**

It is proper to combine different claims in a single writ petition, and to request different kinds of relief if the facts warrant it. See, *e.g.*, *Bunnell v Superior Court* (1975) 13 C3d 592 (prohibition on double jeopardy ground; mandate to compel venue change); *McCarthy v Superior Court* (1958) 162 CA2d 755 (prohibition to restrain trial after denial of right to counsel at preliminary hearing; mandate to order production and inspection of defendant's statement to police after arrest).

In some situations, it may be appropriate to issue both mandate and prohibition to provide relief on a single claim. See *Gomez v Superior Court* (1958) 50 C2d 640 (prohibition to restrain court from proceeding with trial; mandate to compel court to transfer the case to appropriate

court). See also *Bryan v Superior Court* (1972) 7 C3d 575 (prohibition to restrain prosecution of minor in adult court; mandate to compel juvenile court to reconsider minor's amenability to its treatment).

When motions to set aside the information (see Pen C §995) and to suppress evidence (see Pen C §1538.5) raise the same legal issue of unlawful search or seizure and are denied concurrently, it is permissible to combine a petition for writ of prohibition to review the Pen C §995 denial and a petition for writ of mandate or prohibition to review the Pen C §1538.5 denial. Penal Code §999a requires that the petition be filed within 15 days; under Pen C §1538.5(i), the petition for mandate or prohibition may be filed within 30 days. Therefore, to be timely, a petition seeking joint relief should be filed within 15 days. *Gallik v Superior Court* (1971) 5 C3d 855, 857 n1; *Amacher v Superior Court* (1969) 1 CA3d 150, 155. Procedural difficulties can arise from the failure to distinguish the separate motions under Pen C §§995 and 1538.5 to litigate a search and seizure issue. See *People v Laiwa* (1983) 34 C3d 711, 716; *People v Haybron* (1980) 108 CA3d 31, 35; *People v Superior Court (Kusano)* (1969) 276 CA2d 581, 584.

#### **§7.6 D. Either Writ May Be Proper When Challenging Speedy Trial Violations**

Following the rule set forth in *People v Wilson* (1963) 60 C2d 139, 149, the California Supreme Court has favored mandate when the constitutional or the statutory right to a speedy trial in felony prosecutions has been denied. See *Sykes v Superior Court* (1973) 9 C3d 83 (prayer in alternative; mandate issued directing dismissal); *Rice v Superior Court* (1975) 49 CA3d 200; *Huerta v Superior Court* (1971) 18 CA3d 482. Prohibition will also lie "to prevent the trial court from taking any further action in the criminal proceeding other than to order its dismissal." *Wilson*, 60 C2d at 149.

However, some courts of appeal have granted prohibition for speedy trial violations in misdemeanor cases. See *Castaneda v Municipal Court* (1972) 25 CA3d 588; *Caputo v Municipal Court* (1960) 184 CA2d 412. The supreme court has also recognized that, although a petition for mandate or prohibition is the preferred pretrial remedy for denial of a speedy trial under Pen C §1382, relief may also be available by writ of habeas corpus in exceptional cases. See *People v Johnson* (1980) 26 C3d 557; *In re Smiley* (1967) 66 C2d 606. On the availability of mandate to raise speedy trial issues, see §7.18.



**§7.7 IV. STATUTES AND RULES OF COURT  
AUTHORIZING REVIEW BY PETITION FOR  
WRIT OF MANDATE OR PROHIBITION**

Review by petition for writ of mandate or prohibition is authorized by statute or court rule in the following circumstances:

- Review of grant or denial of motion to suppress evidence (Pen C §1538.5(i) and (o));
- Review of denial of motion to dismiss under Pen C §995 (including enhancements) (Pen C §999a; see *People v Superior Court (Mendella)* (1983) 33 C3d 754; on People's right to correction of minor errors without dismissal, see Pen C §999a discussed in §7.25; on People's right to seek reinstatement of complaint after dismissal, see Pen C §871.5, discussed in §1.28);
- Review of Welf & I C §707 orders (Cal Rules of Ct 5.770(i) and 5.772(j) (must be filed within 20 days after arraignment in adult court); on People's right, see *People v Superior Court (Jones)* (1998) 18 C4th 667, 679);
- Review of denial of disqualification motion under CCP §170.1 (for cause) or §170.6 (peremptory) (CCP §170.3(d); *People v Hull* (1991) 1 C4th 266; but see *People v Brown* (1993) 6 C4th 322, 332 (may raise due process right to unbiased judge on appeal); see also *People v Superior Court (Jimenez)* (2002) 28 C4th 798 (defendant's Pen C §1538.5(p) right to have original judge hear renewed suppression motion after dismissal and refiling precludes prosecution from peremptorily challenging judge under CCP §170.6);
- To compel trial setting within Pen C §1049.5 time period (Pen C §1511);
- Review by People of orders granting severance or discovery (Pen C §1512(a));
- Review by People or defendant of allegedly improper setting or continuance of preliminary hearing (Pen C §871.6);
- Review by defendant when People's motion to reinstate complaint under Pen C §871.5 is granted (Pen C §871.5(f); on time limits, see *Los Angeles Chem. Co. v Superior Court* (1990) 226 CA3d 703, 709);

- Review of adverse child custody order in case in which an individual has been arrested for alleged violation of Pen C §278 or §278.5 (taking or concealing child from lawful custodian) (Pen C §279.6(d));
- Review of adverse ruling on motion to exclude public from portion of criminal proceeding in which trade secret might be revealed (Evid C §1062(d));
- Review by People of order granting motion to return property (Health & S C §11488.4(h));
- Review by People of probation grant (Pen C §1238(d) (felony); Pen C §1466(a)(8) (misdemeanor));
- Review of order recusing district attorney (Pen C §1424(a)(1); see *People v Superior Court (Greer)* (1977) 19 C3d 255, superseded by statute on other grounds as stated in *People v Cannedy* (2009) 176 CA4th 1474, 1481 n5; *People v Conner* (1983) 34 C3d 141); and
- Grant or denial of defendant's motion for DNA testing under Pen C §1405 (Pen C §1405(k)).

For a list of statutory time limits for seeking writ relief, see §7.13.

## V. PREREQUISITES TO RELIEF BY WRIT OF MANDATE OR PROHIBITION

### §7.8

#### A. Appellate Remedy Inadequate

The availability of direct appellate review of a trial court order or judgment in a criminal case is determined by statute. In a criminal case, appeal is available as a matter of right for the defendant under Pen C §§1237, 1237.5, 1239, 1466(b), and 1538.5(j), (m), and for the prosecution under Pen C §§1238, 1466(a), and 1538.5(j). See chap 1. The right of direct review is supplemented by the constitutional and statutory power vested in the courts to grant writ relief when there is no immediate right to appeal, when the remedy on appeal is inadequate, or when the issue is one of great public importance and it requires prompt resolution. *People v Mena* (2012) 54 C4th 146, 155; *Powers v City of Richmond* (1995) 10 C4th 85, 113. See also *Morse v Municipal Court* (1974) 13 C3d 149, 155 (writ review appropriate to resolve constitutional challenge to statutory program (diversion) of widespread concern). The petitioner bears the burden of demonstrating that the remedy of appeal is inadequate. *People v Superior Court (Miller)* (1956) 140 CA2d 510.

If there is a right to appeal, the major procedural obstacle to writ relief is persuading the reviewing court that the ordinary remedy of appeal is

inadequate. When pretrial relief is sought, statutory and case law require a showing that there is no plain, speedy, and adequate remedy in the ordinary course of the law. CCP §1086 (mandate), §1103 (prohibition). See *Shuford v Superior Court* (1974) 11 C3d 903; *Moore v Municipal Court* (1959) 170 CA2d 548.

When the petitioner has a right of appeal from the final judgment and waiting to decide the issue raised by the writ petition will have no adverse effect on the remedy obtained (*e.g.*, the denial of a motion to suppress evidence), a reviewing court has discretion to deny the petition without deciding the merits. See *People v Medina* (1972) 6 C3d 484, 493 (dictum). See also *Powers v City of Richmond* (1995) 10 C4th 85, 113. Note, however, that when writ review is the only means of appellate review of a final order or judgment, the appellate court may not deny a timely, formal, procedurally sound petition for a writ that appears to have merit simply because that petition “presents no important issue of law” or because the court believes other matters are more worthy of its attention. *Powers v City of Richmond* (1995) 10 C4th 85, 114.

Determining the adequacy of the remedy on appeal is in the discretion of the reviewing court, although that discretion is not absolute and is subject to review for abuse. The issuance of an alternative writ is ordinarily treated as a determination that appeal is inadequate. *People v Superior Court (Hartway)* (1977) 19 C3d 338, 344 n3.

## §7.9 1. Defendant’s Appellate Remedy Inadequate

Ordinarily, when the defendant seeks writ relief before trial, the issue to be addressed in the writ is one that can be addressed later on appeal from a final judgment. In this situation, the petition should “show some special reason why the remedy afforded by appeal is rendered inadequate by the particular circumstances of the case.” *Conway v Municipal Court* (1980) 107 CA3d 1009, 1016. Some of the factors a court may consider in determining whether the appellate remedy is adequate include the following (*Hogya v Superior Court* (1977) 75 CA3d 122, 128):

the expense of proceeding with trial, prejudice resulting from delay, inordinate pretrial expenses, the possibility the asserted error might not infect the trial, and the possibility the asserted error might be corrected in a lower tribunal before or during trial. A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of an extraordinary writ.

See also *Shuford v Superior Court* (1974) 11 C3d 903, 907 (granting pretrial relief because of “personal hardships” for defendant and “waste of public time and funds” entailed in trial and appeal).

It is not possible to enumerate all the circumstances that might make the remedy on appeal inadequate in a particular case, but some examples of situations in which California courts have deemed the remedy inadequate follow:

- *Serna v Superior Court* (1985) 40 C3d 239, 264 (appeal inadequate remedy for violation of Sixth Amendment right to speedy trial);
- *People v Pompa-Ortiz* (1980) 27 C3d 519, 528 (appellate remedy for denial of Pen C §995 motion inadequate because defendant would not be entitled to relief on appeal after judgment without showing prejudice);

**NOTE►** On review by pretrial writ petition, defendant must still demonstrate prejudice if alleged irregularity at the preliminary examination is nonjurisdictional. *Reilly v Superior Court* (2013) 57 C4th 641, 652 (clarifying “dictum” in *Pompa-Ortiz v Superior Court* (1980) 27 C3d 519, 528).

- *Rubio v Superior Court* (1979) 24 C3d 93, 97 (appellate remedy inadequate because of seriousness of charge and desirability of trying case before properly selected jury);
- *Shuford v Superior Court* (1974) 11 C3d 903, 907 (pretrial writ of prohibition appropriate to restrain court from retrying indigent defendant until it provided him with free transcript of first trial);
- *Bravo v Cabell* (1974) 11 C3d 834, 837 n1 (writ relief appropriate when claims involved scope of pretrial discovery); and
- *Williams v Superior Court* (1984) 36 C3d 441, 447; *Coleman v Superior Court* (1981) 116 CA3d 129 (denial of severance motion);
- *Reilly v Superior Court* (2013) 57 C4th 641, 654 (challenge to material errors in Sexually Violent Predator Act assessment protocol).

## **§7.10            2. Prosecution’s Appellate Remedies Inadequate**

The prosecution has the right of direct appeal in the specific circumstances designated in Pen C §1238. See also Pen C §1466(a) (misdemeanors). When there is a direct right to appeal an order of the trial court, the prosecution, like the defendant, must show that the remedy of appeal is

inadequate. See, e.g., *People v Superior Court (Ghilotti)* (2002) 27 C4th 888, 900 n4 (prosecution had right to appeal dismissal of sexually violent predator petition, but remedy was inadequate because dismissal would result in release of potentially dangerous individual).

California courts have, however, been reluctant to give the prosecution the right of writ review in every situation in which there is no right to appeal. The courts have held that statutory restriction on the state's right to appeal "is not merely a procedural limitation allocating appellate review between direct appeals and extraordinary writs but is a substantive limita-



tion on review of trial court determinations in criminal trials.” *People v Superior Court (Howard)* (1968) 69 C2d 491, 498.

Thus, if the prosecution has not been granted a right of appeal by statute, writ review of alleged error may be sought only when (1) a trial court has acted in excess of its jurisdiction, and (2) the need for review outweighs the risk of harassment of the accused. *People v Superior Court (Stanley)* (1979) 24 C3d 622 (judge granted change of venue motion; such orders not appealable, and mandate denied because it was ordinary judicial error at most).

What actions are “in excess of jurisdiction” in this context is not completely settled. *People v Superior Court (Maldonado)* (2006) 137 CA4th 353, 364. Compare *People v Superior Court (Levy)* (1976) 18 C3d 248 (order disclosing identity of confidential informer not in excess of jurisdiction), with *People v Superior Court (Manuel G.)* (2002) 104 CA4th 915, 919 (question whether court correctly interpreted constitutional, statutory, and case law makes issue presented question of whether court acted in excess of jurisdiction).

Examples of situations in which the courts have concluded the prosecution was entitled to writ review because the lower court’s action was in excess of jurisdiction include the following:

- *People v Superior Court (Jones)* (1998) 18 C4th 667, 676 (fitness order that incorrectly vests juvenile court with jurisdiction subject to writ review);
- *People v Superior Court (Bell)* (2002) 99 CA4th 1334, 1338 (prosecution entitled to pretrial writ review of trial court’s ruling on Pen C §995 motion);
- *People v Superior Court (Rowland)* (1987) 194 CA3d 11 (prosecution entitled to pretrial writ review of trial court’s pretrial order authorizing separate juries); and
- *People v Superior Court (Mitchell)* (2010) 184 CA4th 451 (prosecution entitled to pretrial review of discovery sanction order precluding use of evidence).

## §7.11 B. Petitioner Must Be Beneficially Interested

To have standing to petition for writ relief, the petitioner must be “beneficially interested” in the order or ruling complained of; in other words, the petitioner must have “some special interest to be served or some particular right to be preserved or protected over and above the interest held

in common with the public at large.” *Tobe v City of Santa Ana* (1995) 9 C4th 1069, 1086 (citations omitted). See *People ex rel Dep’t of Conservation v El Dorado County* (2005) 36 C4th 971, 986 (defining “beneficial interest”); *Dix v Superior Court* (1991) 53 C3d 442 (crime victim did not have standing to challenge trial court’s sentencing order by petition for writ of mandate or prohibition); *Wells v Municipal Court* (1981) 126 CA3d 808 (absence of beneficial interest precluded public defender from seeking relief from allegedly mandatory sentencing policy).

Ordinarily, neither the trial court nor the judges of the trial court have a beneficial interest in the outcome of legal proceedings, even when the petition challenges the trial court’s ruling. *Gressett v Superior Court* (2010) 185 CA4th 114, 117 n3; *Ng v Superior Court* (1997) 52 CA4th 1010, 1016, disapproved on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6. But see *James G. v Superior Court* (2000) 80 CA4th 275 (superior court had standing to oppose petition for writ of mandate, because all proceedings were filed ex parte under seal and court was only party that could meaningfully oppose petition).

### §7.12 C. Petitioner Must Perfect or Exhaust Lower Court Remedies

A general prerequisite for writ relief is that the same relief was sought first in the lower court, by way of motion, objection, or other request, and was denied by that court. The requested relief must have been made on the same ground that is urged in the petition. *Schaeffer v Municipal Court* (1968) 260 CA2d 819; *Shaffer v Justice Court* (1960) 185 CA2d 405; *In re Hillery* (1962) 202 CA2d 293, 294. Moreover, if writ review is requested on several issues, relief must first have been sought on each issue in the trial court. *Cooper v Superior Court* (1981) 118 CA3d 499, 511 (writ court considering error in denial of Pen C §1538.5 motion refused to address propriety of joinder of unrelated crimes until defendant moved for severance in trial court).

This rule is not absolute. See *Citizens Utils. Co. v Superior Court* (1963) 59 C2d 805, 814. The petitioner may be excused from complying with this requirement if he or she can show that there was no appropriate opportunity to make a timely objection in the lower court or that objection would have been futile. *People v Welch* (1993) 5 C4th 228, 237 (and cases cited).



**D. Petition Must Be Timely****§7.13****1. Petitioner Must Comply With Applicable Statutory Time Limits**

When a statute provides authority for seeking writ relief, the statute may specify time limits within which a petition for extraordinary relief must be filed. Examples include:

- CCP §170.3(d) (“within 10 days after service of written notice of entry of the court’s order determining the question of disqualification”; see *People v Hull* (1991) 1 C4th 266);
- Pen C §999a (within 15 days of order denying Pen C §995 motion if challenge is to sufficiency of the evidence);
- Pen C §1538.5(i) (within 30 days after denial of motion to suppress evidence);
- Pen C §1538.5(o) (within 30 days after grant of motion to suppress evidence; notice of intent to file petition must be filed under certain circumstances);

**NOTE►** Under Pen C §1510, the denial of a Pen C §995 motion or the denial of a Pen C §1538.5 motion may be reviewed by petition for extraordinary relief *only* if the motion was made within 60 days of the defendant’s arraignment on the information or indictment.

- Health & S C §11488.4(h) (within 15 days of order granting defendant’s motion to return property in conjunction with forfeiture proceeding);
- Pen C §1238(d) (within 60 days of order granting probation); and
- Pen C §1405k (within 20 days of order granting or denying defendant’s motion for DNA testing).

Statutes authorizing writ relief in specific situations are listed in §7.7.

**§7.14****2. Petitioner Must Exercise Diligence in Seeking Relief**

The absence of a specific statutory time limit for filing a writ petition does not mean that a petitioner can delay unreasonably in seeking relief. See, e.g., *Maine v Superior Court* (1968) 68 C2d 375, 381 (defendant should seek writ after denial of change of venue before jury empaneled); *People v Wilson* (1963) 60 C2d 139, 148 (remedy for speedy trial violation is to seek writ of mandate before trial begins).

A writ ordinarily will not lie to obtain review of issues that could have and should have been raised on appeal. *In re Clark* (1993) 5 C4th 750, 765; *Adoption of Alexander S.* (1988) 44 C3d 857, 865. The courts have occasionally made exceptions in “special circumstances constituting an excuse for failure to employ that remedy.” 44 C3d at 865. These circumstances have been narrowly construed. *Mauro B. v Superior Court* (1991) 230 CA3d 949, 953. “The underlying facts cannot provide a basis for allowing use of an extraordinary writ to review an appealable judgment or order after the time for an appeal has expired. The required special circumstances must relate to the delay and justify the petitioner’s failure to employ the appeal remedy.” 230 CA3d at 954. Examples include situations in which the petitioner did not receive actual notice of the order (see *Grinbaum v Superior Court* (1923) 192 C 528, 556) and situations in which the law was unclear about whether an appeal would lie (see *Drum v Superior Court* (2006) 139 CA4th 845, 852).

Even when no appeal lies, timeliness is an important consideration. Petitioner may be required to justify the delay if a petition is filed after the date on which a notice of appeal would be required, even if petitioner has no remedy on appeal. Courts routinely apply the deadline that would be applicable to filing a notice of appeal to writ petitions as a benchmark for determining whether unreasonable delay has occurred. See, e.g., *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 699; *People v Municipal Court (Mercer)* (1979) 99 CA3d 749, 752; *Scott v Municipal Court* (1974) 40 CA3d 995, 996.

If the reviewing court considers the delay in filing the petition unreasonable, it may decline to hear the petition on the merits under the equitable doctrine of laches if the opposing party has been prejudiced by the delay. See *Peterson v Superior Court* (1982) 31 C3d 147, 163 (laches “requires an unreasonable delay in filing the petition plus prejudice to real party”). See also *Wagner v Superior Court* (1993) 12 CA4th 1314, 1317 (no absolute deadline for mandate petition but laches may apply if unreasonable delay prejudices opposing party).

In *People v Superior Court (Clements)* (1988) 200 CA3d 491, 596, the court of appeal exercised its discretion to hear a petition for writ of mandate despite unexcused delay because the issue was one of general importance that might have escaped review if not addressed in the petition. In *Irwin Mem. Blood Ctrs. v Superior Court* (1991) 229 CA3d 151, 156, the court agreed to hear a petition for writ of prohibition on the merits, despite finding unexcused delay and prejudice to the opposing party because peti-

tioner was seeking to protect privacy rights of third persons who did not cause the delay and were not before the reviewing court.

Laches is an affirmative defense; because it does not reach the merits of the case, the burden is on the party asserting laches to show that it should be applied to bar consideration of the petitioner's claims. *Conti v Board of Civil Serv. Comm'rs* (1969) 1 C3d 351, 361.

### §7.15 3. Mootness

Ordinarily, courts will deny a petition that is moot. *Bruce v Gregory* (1967) 65 C2d 666, 670. If the case involves an important, recurring issue, likely to evade review in the future, the court may decide the merits of the case. *In re William M.* (1970) 3 C3d 16, 23.

## VI. WRIT OF MANDATE: SPECIFIC USES

### §7.16 A. Overview

The writ of mandate, also called a writ of mandamus (see *e.g.*, *Bravo v Cabell* (1974) 11 C3d 834), has common law origins. The Code of Civil Procedure §§1084–1094 uses the term mandate. Consistent with modern usage, this book uses the term “writ of mandate.” The writ of mandate lies generally to *compel* a court or its officer to perform an act that the law imposes as a duty when no plain, speedy, and adequate remedy at law is available. CCP §§1085–1086; *Payne v Superior Court* (1976) 17 C3d 908, 925; *Loder v Municipal Court* (1976) 17 C3d 859, 863. Thus, mandate will lie when the court's acts are in excess of its jurisdiction. See *People v Turner* (2004) 34 C4th 406, 417 (court of appeal had authority to issue mandate vacating sentence resulting from court's illegal plea bargain with defendant). Although it has been said that mandate cannot be used to control the exercise of discretion, mandate can issue to correct an abuse of the court's discretion. *Hays v Superior Court* (1940) 16 C2d 260, 265. Thus, in *Owens v Superior Court* (1980) 28 C3d 238, 253, the court issued a peremptory writ of mandate compelling the court to dismiss a prosecution for delay not excused by good cause.

Historically, mandate has been used to accomplish two objectives:

- To require the court to exercise its power to decide a controversy when it has refused or failed to do so and to hear and rule on the merits of all matters properly within its jurisdictional discretion (*Burnett v Superior Court* (1974) 12 C3d 865; *Robinson v Superior Court* (1950) 35 C2d 379); and

- To set aside an order or judgment that is in excess of the court's jurisdiction or exceeds or abuses the discretion vested in the court (*People v Superior Court (Howard)* (1968) 69 C2d 491; *Gray v Superior Court* (2005) 125 CA4th 629, 641; *People v Municipal Court (Kong)* (1981) 122 CA3d 176; *Parks v Superior Court* (1971) 19 CA3d 188).

Decisions in criminal cases emphasize the use of mandate to rectify error "before a constitutionally defective trial is undertaken." *Smith v Superior Court* (1968) 68 C2d 547, 558. As explained in *Maine v Superior Court* (1968) 68 C2d 375, 378, the "common thread woven through the foregoing examples of mandamus antedating trial is the responsiveness of appellate tribunals when initiative is required to protect a defendant's fundamental right to a fair trial." Failure to allege and prove a duty of the respondent to act can defeat the petitioner's right to relief. *Bradshaw v Duffy* (1980) 104 CA3d 475, 481.

## B. Pretrial Uses

### §7.17

#### 1. Discovery

Mandate is available to both the prosecution and the defendant to enforce a right to pretrial discovery. *Hill v Superior Court* (1974) 10 C3d 812 (defendant); *Joe Z. v Superior Court* (1970) 3 C3d 797 (defendant); *Reid v Superior Court* (1997) 55 CA4th 1326, 1332 n3 (same, citing this text); *People v Superior Court (Mitchell)* (1993) 5 C4th 1229 (prosecution). See also *Hinojosa v Superior Court* (1976) 55 CA3d 692 (mandate granted after trial court denied defendant's *Pitchess* motion; see *Pitchess v Superior Court* (1974) 11 C3d 531); *Griffin v Municipal Court* (1977) 20 C3d 300 (mandate granted after trial court denied defendant's motion for discovery of records that might establish discriminatory law enforcement practices; see *Murgia v Municipal Court* (1975) 15 C3d 286); *Honore v Superior Court* (1969) 70 C2d 162 (mandate granted after trial court denied motion to disclose the identity of confidential informant); *Fagan v Superior Court* (2003) 111 CA4th 607 (mandate granted to prevent dissemination and disclosure of information obtained by prosecution pursuant to Pen C §832.7 absent compliance with Evid C §§1043–1047).

Either mandate or prohibition may be used to challenge an improper discovery order in favor of the prosecution. *Posner v Superior Court* (1980) 107 CA3d 928, disapproved on other grounds in *Baqleh v Superior Court* (2002) 100 CA4th 478, 499 n5. See also Pen C §1512 (prosecution may use mandate or prohibition to review trial court's order granting discovery).

**§7.18            2. Denial of Speedy Trial Rights**

Under California law, both the defendant and the prosecution have a right to a speedy trial. Cal Const art I, §6 (defendant), §29 (prosecution).



The defendant's right to a speedy trial is also guaranteed by statute (Pen C §§1381, 1381.5, 1382) and by the United States Constitution (US Const amend VI, XIV).

Mandate is ordinarily the remedy for a violation of the statutory right to speedy trial. See *People v Wilson* (1963) 60 C2d 139, 148. Specific prejudice need not be shown. See *Owens v Superior Court* (1980) 28 C3d 238. The remedy on appeal is not considered adequate in this circumstance because the defendant must show prejudice to succeed in a postconviction challenge to the denial of a motion to dismiss based on the statutory right to a speedy trial. See *People v Johnson* (1980) 26 C3d 557, 574.

**NOTE►** In addition to factors that impair the defendant's ability to defend against the charges (*e.g.*, death or disappearance of witnesses, impairment of memory, loss of evidence), prejudice exists when dismissal would terminate the action; *e.g.*, when refiling would be barred by the statute of limitations (60 C2d at 152) or Pen C §1387. *People v Wilson* (1963) 60 C2d 139, 152.

When the state Constitution's speedy trial right is at issue, "a showing of specific prejudice is required to establish a violation," whether the issue is raised before trial or after judgment. *People v Martinez* (2000) 22 C4th 750, 756.

The federal Constitution's right to speedy trial poses still different considerations, because the threshold showing required to establish a violation also creates a presumption of prejudice. See *Barker v Wingo* (1972) 407 US 514, 92 S Ct 2182; *Doggett v U.S.* (1992) 505 US 647, 651, 656, 112 S Ct 2686.

In deciding whether to seek pretrial review of the denial of the defendant's speedy trial motion, it is important to consider whether the defendant is likely to plead guilty or no contest if the motion is denied. The weight of authority in California holds that a speedy trial claim, whether based on statutory or constitutional grounds, does not survive a plea of guilty or nolo contendere. See, *e.g.*, *People v Aguilar* (1998) 61 CA4th 615; *People v Egbert* (1997) 59 CA4th 503, 512. Because "[t]he essence of a defendant's speedy trial or due process claim in the usual case is that the passage of time has frustrated his ability to establish his innocence," the issue does not survive a guilty plea, which admits every element of the offense. *People v Hayton* (1979) 95 CA3d 413, 419. See *People v DeV Vaughn* (1977) 18 C3d 889, 895.

For discussion of the defendant's right to a speedy trial, see California Criminal Law Procedure and Practice, chap 19 (Cal CEB).

### 3. Ruling on Pen C §1538.5 Motion to Suppress Evidence

#### §7.19 a. Availability in Felony Cases

Another important use of mandate specifically authorized by statute is to contest an adverse ruling by the superior court on a motion to suppress evidence claimed to be the product of an unlawful search or seizure. See Pen C §1538.5. Mandate or prohibition are the remedies for pretrial review of such rulings. Pen C §1538.5(i) (defense), §1538.5(o) (prosecution). The remedy is expressly authorized by statute, although the defendant enjoys the right to raise the identical issue on appeal from the final judgment, even after a plea of guilty. Pen C §1538.5(m). See Cal Rules of Ct 8.304(b)(4); *People v West* (1970) 3 C3d 595. This remedy must be exercised by filing the writ petition in the court of appeal within 30 days of the denial of the suppression motion. Pen C §1538.5(i). If unable to go forward without the suppressed evidence, however, the prosecution may elect to appeal from a pretrial order of dismissal. Pen C §§1238(a)(8), 1466(a)(2). If the prosecution does appeal, the defendant has an additional 30 days within which to file a writ application. Pen C §1238.5.

In felony cases, direct appellate review by the prosecution of a magistrate's suppression order at a preliminary hearing is not permitted. The prosecution may file a new complaint (Pen C §1538.5(j); *People v Randall* (1973) 35 CA3d 972; *Cash v Superior Court* (1973) 35 CA3d 226) or may make a noticed motion in the superior court within 15 days after a felony complaint has been dismissed for reinstatement of the complaint (Pen C §871.5(a)). If the superior court grants the motion, the magistrate must resume proceedings. If the defendant is held to answer, he or she may seek review of the ruling on this motion only by a Pen C §995 motion, and may challenge its denial by seeking a writ of prohibition under Pen C §999a. Pen C §871.5(f). The prosecution may obtain pretrial writ review of the court's ruling on a Pen C §995 motion (*People v Superior Court (Bell)* (2002) 99 CA4th 1334, 1338) or may appeal after trial (Pen C §1238(a)(9)).

#### §7.20 b. Availability in Misdemeanor Cases

In misdemeanor cases, both the defendant and the prosecution have an unqualified right to an immediate appeal in the appellate division of the superior court from an adverse ruling on a pretrial motion to suppress evidence under Pen C §1538.5. Pen C §1538.5(j); *People v Laiwa* (1983) 34



C3d 711, 718. Thus, a writ of mandate cannot ordinarily be used to challenge such a ruling. *Macias v Municipal Court* (1975) 49 CA3d 259.

**§7.21 c. Substantial Evidence Standard [Deleted]**

The material in this section has been deleted.

**§7.22 d. Time Limitations for Pretrial Relief: Pen C §§1538.5, 1510**

In cases involving writs of mandate under Pen C §1538.5, there are restrictions comparable to those placed on pretrial review of denial of a Pen C §995 motion (see §7.35). Two time limitations control:

- The petition for writ of mandate must be filed within 30 days after the motion to suppress is denied (see Pen C §1538.5(i)—defendant’s petition) or granted (see Pen C §1538.5(o)—prosecution’s petition). *Clifton v Superior Court* (1970) 7 CA3d 245 (no jurisdiction to consider untimely petition). Moreover, if a motion to suppress is granted and trial is set for less than 30 days thereafter, the prosecution, if unable to file the petition before the trial date, must file a notice of intention to file such a petition. This notice must be filed in the superior court by the trial date or within 10 days after the suppression hearing, whichever occurs later. Pen Code §1538.5(o); *People v Superior Court (Abrahms)* (1976) 55 CA3d 759, 765. But see *People v Superior Court (Sandoval)* (1972) 29 CA3d 135. The applicable time periods are jurisdictional. Time begins to run when the motion to suppress is actually granted or denied, not when the order is entered in the minutes. *Gomes v Superior Court* (1969) 272 CA2d 702.
- Denial of a Pen C §1538.5 motion may be reviewed in a pretrial petition for writ in felony cases only if the motion is made by the defendant not later than 60 days following arraignment on the information or indictment (felony cases), unless within this time limit the defendant was unaware of the issue or had no opportunity to raise it. Pen C §1510. See *People v Dianda* (1986) 178 CA3d 174, 178 (motion “made” when written notice filed). See also *Ghent v Superior Court* (1979) 90 CA3d 944, 950 (applying “no opportunity” exception when Pen C §995 motion made 3 days too late because there had been lengthy delay in providing counsel with preliminary hearing transcript). In misdemeanor cases, the Pen C §1538.5 motion must

have been made not later than 45 days following arraignment on the complaint unless the defendant was unaware of the issue or had no opportunity to raise it. Pen C §1510. An oral statement at arraignment noticing or reserving a Pen C §1538.5 motion for a subsequent date does not constitute compliance with Pen C §1510, because it does not indicate that the suppression motion will in fact be made nor the grounds for the motion. *Smith v Superior Court* (1978) 76 CA3d 731. Although Pen C §1510 does not require that the §1538.5 motion be heard within the 60- or 45-day periods, in light of *Smith*, defense counsel should give timely notice to the court and prosecutor (in writing if required by local court rule) that the defendant is moving to suppress evidence under Pen C §1538.5, specifying what evidence he or she seeks to suppress and the grounds for suppression.

**§7.23 e. Mandate Not Available to Challenge  
Pretrial Rulings on Admissibility of  
Evidence Not Involving Unlawful Search or  
Seizure**

The statutory authorization for the use of mandate to challenge pretrial rulings on motions to suppress evidence under Pen C §1538.5 is an exception to the ordinary rule that pretrial rulings on the admissibility of evidence are not reviewable by extraordinary writ. See *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658; *Sledge v Superior Court* (1974) 11 C3d 70; *People v Superior Court (Scott)* (1980) 112 CA3d 602; *Childress v Municipal Court* (1970) 8 CA3d 611; *Van Halen v Municipal Court* (1969) 3 CA3d 233.

The rationale for this rule is that pretrial rulings are binding on neither the judge nor the parties and can be reconsidered during trial. *People v Superior Court (Zolnay)* (1975) 15 C3d 729, 734, overruled on other grounds in *People v Crittenden* (1994) 9 C4th 83, 129; *People v Rawlings* (1974) 42 CA3d 952, 956, disapproved on another ground in *People v Chacon* (2007) 40 C4th 558, 565 n7; *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257.

**§7.24 4. Denial of Motion to Disqualify Judge**

Under CCP §170.3(d), the trial court's ruling on a motion to disqualify a judge may be reviewed only by writ of mandate. The petition must be filed in the appropriate court of appeal "within 10 days after service of

written notice of entry of the court's order determining the question of disqualification." Only a party to the proceeding may bring the motion. CCP §170.3(d). This provision is applicable to rulings on challenges for cause under CCP §170.1 and to peremptory challenges under CCP §170.6. *People v Carter* (2005) 36 C4th 1215, 1243; *People v Hull* (1991) 1 C4th 266.

The defendant can raise a due process claim on appeal based on actual bias despite the provisions of CCP §170.3(d). *People v Brown* (1993) 6 C4th 322, 333. In *Brown*, the supreme court held that CCP §170.3(d) bars appeal from the denial of a statutory disqualification motion but does not bar postjudgment claims that the judgment is invalid because of judicial bias. 6 C4th at 335. The court suggested, however, that the negligent failure to seek to resolve such issues by statutory means (*i.e.*, through writ review) might result in forfeiture of the constitutional claim on appeal. 6 C4th at 336. But see *Catchpole v Brannon* (1995) 36 CA4th 237, disapproved on other grounds in *People v Freeman* (2010) 47 C4th 993, 1006 n4 (judge's asserted gender bias could be raised on appeal despite lack of objection in trial court).

**NOTE►** Although a showing of actual bias is not required for judicial disqualification under the due process clause, the mere appearance of bias is insufficient. *Freeman, supra*.

## §7.25 5. Erroneous Orders Under Pen C §999a(b)

Under Pen C §999a(b), the superior court, instead of granting a motion under Pen C §995, can remand the case to the magistrate for correction of minor errors of omission, ambiguity, or technical defect. However, this does not allow the superior court to return a case to the magistrate to correct major errors. In such cases, mandate will issue to require the superior court to rule on the §995 motion without sending the matter back to the magistrate. *Tharp v Superior Court* (1984) 154 CA3d 215; *Loverde v Superior Court* (1984) 162 CA3d 102.

In addition, a remand order is not permitted if the motion to set aside an information is not authorized by Pen C §995 but is instead a nonstatutory *Stanton* motion (a motion based on events not shown by the preliminary hearing transcript and thus not cognizable in a §995 motion). *Stanton v Superior Court* (1987) 193 CA3d 265; *Currie v Superior Court* (1991) 230 CA3d 83, 89. For more information on *Stanton* motions, see §7.38.

For further discussion of motions to set aside the accusatory pleading under Pen C §995, see California Criminal Law Procedure and Practice, chap 13 (Cal CEB).

## §7.26 6. Change of Venue

**Defendant.** Under Pen C §1033(a), the defendant may compel a change of venue by showing before trial that there is a “reasonable likelihood” that he or she will not receive fair trial in the county in which the alleged offense was committed. Mandate is an appropriate way for the defendant to challenge the trial court’s denial of a motion for change of venue. *Frazier v Superior Court* (1971) 5 C3d 287; *Maine v Superior Court* (1968) 68 C2d 375.

Principles of judicial economy favor challenging venue orders by mandate rather than on appeal because writ review allows the reviewing court to determine the place of trial before trial. In addition, the standard of review is more favorable to the defendant seeking pretrial writ relief: When the venue issue is raised before trial, doubts are to be resolved in favor of granting the motion. To prevail on appeal, the defendant must show that the error was prejudicial. Compare *Fain v Superior Court* (1970) 2 C3d 46, with *People v Harris* (1981) 28 C3d 935, 948.

**Prosecution.** The prosecution has no parallel right to compel a change of venue. See Pen C §1033(b) (prosecution may compel change of venue only when all jury panels have been exhausted and it appears that it will be impossible to empanel jury). In addition, the prosecution has no statutory right to appeal from the trial court’s ruling on a motion for change of venue. See Pen C §1238. Thus, ordinarily the prosecution may not use mandate either to challenge the trial court’s order granting a change of venue or to compel a change of venue. See *People v Superior Court (Stanley)* (1979) 24 C3d 622 (restriction on prosecution’s right to appeal required court to deny prosecution’s petition for writ of mandate challenging trial court’s order for change of venue); *Jackson v Superior Court* (1970) 13 CA3d 440 (trial court order granting prosecution’s application for change of venue vacated by mandate because it was beyond court’s statutory and inherent powers).

## §7.27 7. Other Pretrial Issues

Other important uses for which mandate is appropriate for pretrial purposes are:

- **Right to counsel.** Used to secure the appointment or substitution of counsel and to rectify violations of that right. *Harris v Superior Court* (1977) 19 C3d 786 (refusal to appoint attorney selected by defendant for retrial of case when that attorney represented defendant at first trial); *Smith v Superior Court* (1968) 68 C2d 547 (court-appointed counsel was improperly removed over defendant's objection); *Gressett v Superior Court* (2010) 185 CA4th 114 (upholding denial of appointment of specific attorney at county expense); *Craig S. v Superior Court* (1979) 95 CA3d 568 (public defender was improperly removed over defendant's objection); *Rodriguez v Municipal Court* (1972) 25 CA3d 521 (refusal to appoint counsel for indigent in misdemeanor case); *Williams v Superior Court* (1964) 226 CA2d 666 (refusal to appoint counsel when defendant released on bail). See also *Uhl v Municipal Court* (1974) 37 CA3d 526 (public defender sought to be relieved for conflict of interest).
- **Obtaining funds for investigation and preparation.** Used to compel allocation of public funds to an indigent defendant for investigators, experts, and others necessary for preparing and presenting the defense. *Smithson v Superior Court* (1981) 116 CA3d 32 (reasonable rate for investigator's services is lowest present rate in community); *Anderson v Justice Court* (1979) 99 CA3d 398 (test of indigency to obtain investigators and experts under Pen C §987.9 (capital case) is defendant's financial ability to secure those services).
- **Pretrial lineup.** Used to compel the court to order the prosecution to conduct a pretrial identification lineup. *People v Mena* (2012) 54 C4th 146, 155; *Evans v Superior Court* (1974) 11 C3d 617.
- **Severance.** Used to correct a refusal to sever or a misjoinder of offenses (see *Coleman v Superior Court* (1981) 116 CA3d 129; *Walker v Superior Court* (1974) 37 CA3d 938) or of defendants (see *Dove v Superior Court* (1974) 39 CA3d 960; see also *People v Ortiz* (1978) 22 C3d 38).
- **Prejudicial publicity.** Used to protect against prejudicial pretrial publicity and preserve the defendant's right to a fair trial. *Cromer v Superior Court* (1980) 109 CA3d 728; *Allegrezza v Superior Court* (1975) 47 CA3d 948.
- **Gag order.** Used to vacate an improper gag order. *Younger v Smith* (1973) 30 CA3d 138.

- **Recusal of prosecutor's office.** Both the defense and the prosecution may use mandate to review a trial court's abuse of discretion in granting or denying the defendant's motion to recuse a prosecutor. Pen C §1484(a)(1) (writ review of order recusing); *Love v Superior Court* (1980) 111 CA3d 367; *Chadwick v Superior Court* (1980) 106 CA3d 108; *People v Superior Court (Martin)* (1979) 98 CA3d 515.
- **Felony reduced to misdemeanor.** Used to compel the trial court to treat as a misdemeanor an offense that had been reduced from a felony to a misdemeanor by the magistrate at the preliminary hearing under Pen C §17(b)(5). See *Esteybar v Municipal Court* (1971) 5 C3d 119.
- **Daily preliminary hearing transcripts.** Used to compel the court to grant a motion for daily preliminary hearing transcripts to a defendant charged with murder with a special circumstance allegation making the defendant eligible for the death penalty. *Abernathy v Superior Court* (2007) 157 CA4th 642; Pen C §190.9(a)(1).
- **Transcript of prior trial.** Used to obtain a partial or complete transcript of a prior trial when an indigent defendant has a particularized need for it in preparing for retrial. See *People v Hosner* (1975) 15 C3d 60 (need presumed); *Shuford v Superior Court* (1974) 11 C3d 903.

### §7.28 C. Sentencing and Related Postconviction Problems

Use of writ of mandate is occasionally appropriate to raise sentencing and related postconviction issues not traditionally within the scope of habeas corpus relief. In misdemeanor cases, however, writs based on postconviction claims have been denied on the ground that such errors ordinarily should be raised on direct appeal from the judgment rather than in writ proceedings. *Mendieta v Municipal Court* (1980) 109 CA3d 290 (denial of motion to vacate guilty plea); *Gilliam v Municipal Court* (1979) 97 CA3d 704 (condition of probation).

Writ review was allowed in the following circumstances:

- **Striking probation report.** In *People v Municipal Court (Lopez)* (1981) 116 CA3d 456, judgment for the prosecution on a writ action to compel the trial court to vacate an order granting the defendant's motion for a new probation report was reversed. The appellate court concluded that a trial judge has jurisdiction to strike a probation

report. Because this case permitted the prosecution to obtain writ





review of such a ruling in favor of the defense, a defendant whose motion to strike is improperly denied should also be entitled to writ relief before sentencing.

- **Sentence representations made to defendant.** Used to order the trial court to hold a hearing to determine what representations or promises of sentencing were made to the defendant and whether the defendant's reasonable reliance on such representations requires that he or she be sentenced accordingly or have his or her conviction set aside. *Martinez v Superior Court* (1973) 36 CA3d 683.
- **Order granting probation.** Penal Code §1238(d) states that "[n]othing contained in this section shall be construed to authorize an appeal from an order granting probation" but that the prosecution "may seek appellate review of any grant of probation ... by means of a petition for writ of mandate or prohibition." The review must include "any order underlying the grant of probation." Most courts have interpreted §1238(d) to mean that the prosecution may not appeal from a grant of probation but must secure review through mandate or prohibition. See *People v Superior Court (Frietag)* (1988) 204 CA3d 247; *People v Superior Court (Du)* (1992) 5 CA4th 822. The court in *People v Vessell* (1995) 36 CA4th 285, deviated from this path and allowed the prosecution to appeal a probation grant under the authority of Pen C §1238(a)(10). The court in *People v Bailey* (1996) 45 CA4th 926, declined to follow *Vessell*, noting that the application of §1238(d) had not been fully considered by the *Vessell* court, and that the *Vessell* opinion effectively gave the prosecution an appellate remedy that had been precluded by the legislature. Also, it is unclear what "underlying" orders may be reviewed. One case interpreted the term very broadly: In *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, the prosecution was permitted to challenge a trial court order denying a motion to amend the accusatory pleading to allege a prior felony conviction. The court of appeal stated that, although such orders generally did not underlie a grant of probation, the trial court had denied the motion in order to avoid sentencing the defendant to prison, which the court of appeal found "rendered the trial court's denial of the motion a sentencing order for all practical purposes." 207 CA3d at 469.
- **Terminating probation.** In *Pompi v Superior Court* (1982) 139 CA3d 503, the court of appeal issued a writ of mandate compelling the superior court to terminate the defendant's probation because the

court had lost jurisdiction under Pen C §1203.2a (requiring a probation officer to report to the court the fact of the probationer's incarceration elsewhere within 30 days of notice). See also *In re Hoddinott* (1996) 12 C4th 992 (probation officer's 30-day reporting requirement is triggered by written notification of probationer's subsequent state prison commitment; valid request for absentee sentencing not required); *In re Flores* (1983) 140 CA3d 1019 (issue raised by habeas).

- **Expungement of conviction.** Used to direct the trial court to perform its mandatory duty under Welf & I C §1772 of setting aside and dismissing the guilty verdict of an honorably discharged ward of the Division of Juvenile Justice despite his or her subsequent crimes. *Parks v Superior Court* (1971) 19 CA3d 188. See also *Andrews v Superior Court* (1946) 29 C2d 208 (expungement of invalid judgment of conviction).
- **Postconviction discovery.** Used to challenge a ruling by the trial court on the defendant's motion for postconviction discovery under Pen C §1054.9.

## §7.29 D. Perfecting Right of Appeal

To aid the defendant in perfecting the right of appeal, mandate is available in two important areas:

- **Reporter's transcript.** Used to obtain a partial or complete transcript of a reported trial in a misdemeanor or infraction case on an indigent defendant's showing of a colorable need when a settled statement is not sufficient for appeal. *March v Municipal Court* (1972) 7 C3d 422.
- **Certificate of probable cause.** Used to obtain a certificate of probable cause, required under Pen C §1237.5, for an appeal after a plea of guilty in superior court. See also Cal Rules of Ct 8.304(b)(1)–(3); *In re Brown* (1973) 9 C3d 679, 683, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097. On certificates of probable cause, see §§1.12–1.13, 2.8. For sample forms, see §§2.33–2.35. Note that an appeal from a plea of guilty to a misdemeanor or infraction is regulated by Pen C §1466, which does not require a certificate of probable cause. *People v Woods* (1978) 84 CA3d 149, 154.

**§7.30 E. Declaration of Rights (Class Action Relief)**

Although employed sparingly in reported criminal decisions, one of the potentially most significant uses for the writ of mandate is to obtain a declaration of rights for other defendants similarly situated to the named petitioner. This is particularly true concerning the rights of prisoners. See *Schoenfeld v Board of Parole Hearings* (2010) 191 CA4th 1324; *Reaves v Superior Court (Patterson)* (1971) 22 CA3d 587; *In re Brindle* (1979) 91 CA3d 660, 670; *Bradshaw v Duffy* (1980) 104 CA3d 475, 482. See also *In re Walters* (1975) 15 C3d 738 (habeas corpus).

**§7.31 F. Collateral Matters**

A writ of mandate lies to adjudicate numerous matters collateral to criminal proceedings. Examples include:

- **Attorney fees.** Used to compel the trial court to award reasonable attorney fees to appointed counsel for representation in extraordinary writ proceedings. Pen C §987.2; *Polakovic v Superior Court* (1972) 28 CA3d 69. But see *Pedlow v Superior Court* (1980) 112 CA3d 368 (relief denied because record inadequate; Pen C §987.3, added in 1973, said to replace criteria in prior case law for determining reasonable compensation).
- **Denial of voluntary mental health services.** Under Pen C §4011.8, a person in custody who has been charged with or convicted of an offense may apply for voluntary mental health services. The applicant may challenge the denial of such services by writ of mandate. Pen C §4011.8.
- **Return of defendant's property.** Used to seek return of a defendant's property confiscated by the police. *People v Beck* (1994) 25 CA4th 1095 (return of firearms after conviction of offense unrelated to firearm use); *Espinosa v Superior Court* (1975) 50 CA3d 347 (return of firearms after acquittal). See also *People v Superior Court (Loar)* (1972) 28 CA3d 600 (writ of prohibition).
- **Sealing of records.** Used to require the trial court to entertain a motion to seal the record of arrest. *Scott A. v Superior Court* (1972) 27 CA3d 292, 293 n1; *McMahon v Municipal Court* (1970) 6 CA3d 194.

- **Delegation of judicial function.** Used to order the superior court not to delegate to the prosecution its judicial responsibilities for processing prisoners' habeas corpus writs. *Reaves v Superior Court (Patterson)* (1971) 22 CA3d 587.
- **Challenge sex offender registration.** Used to challenge the requirement to register as a sex offender after judgment final. *People v Picklesimer* (2010) 48 C4th 330, 335. See also *Lewis v Superior Court* (2008) 169 CA4th 70 (post-judgment "motion" inappropriate); *In re Stier* (2007) 152 CA4th 63 (habeas corpus petition inappropriate).
- **Failure to lift stay of Pen C §12022.1 enhancement.** Used to challenge the failure of the "primary offense court" to lift the stay of a Pen C §12022.1 enhancement. *People v Meloney* (2003) 30 C4th 1145, 1150.

## §7.32 VII. WRIT OF PROHIBITION: SPECIFIC USES

Prohibition is used to *restrain* a court or its officer when no plain, speedy, and adequate remedy at law is available and when the threatened judicial action is outside or in excess of the court's jurisdiction. CCP §§1102–1103; *Rockwell v Superior Court* (1976) 18 C3d 420, 427; *Rescue Army v Municipal Court* (1946) 28 C2d 460; *Castaneda v Municipal Court* (1972) 25 CA3d 588.

A writ of prohibition "arrests the proceedings of any tribunal ... or person exercising judicial functions." CCP §1102. Consequently, issuance of an alternative writ of prohibition "amounts to a stay of proceedings by operation of law pending determination of the application for a peremptory writ." *Guardianship of Walters* (1951) 37 C2d 239, 241.

### §7.33 A. Overview

Prohibition is considered "a preventive rather than a corrective remedy." *Traffic Truck Sales Co. v Justice's Court* (1923) 192 C 377, 380. It "issues only to restrain the commission of a future act and not to undo an act already performed." 192 C at 380. Thus, prohibition is not available to review or annul a completed judicial proceeding. *Baker v Municipal Court* (1961) 198 CA2d 556 (appeal from denial of writ of prohibition moot when petitioner had been tried, convicted, and sentenced before appeal was heard). However, when the record before the reviewing court justifies relief, the fact that the petition was incorrectly labeled will not prevent the

court from granting relief. See *Traffic Truck Sales*, 192 C at 381 (although prohibition did not lie, record presented sufficient case for consideration as request for writ of review).

In addition to the traditional uses of prohibition to prevent judicial acts in excess of the court's jurisdiction, a number of specific statutes authorize the use of prohibition. See, e.g., Pen C §999a, which provides for filing a petition for a writ of prohibition after the denial of a Pen C §995 motion to set aside an information or an indictment for lack of reasonable or probable cause. For further discussion of motions to set aside an accusatory pleading under Pen C §995, see California Criminal Law Procedure and Practice, chap 13 (Cal CEB).

## B. Common Uses of Prohibition

### §734

#### 1. Challenge to Denial of Pen C §995 Motion

The most frequent use of prohibition is to prevent further proceedings, including trial, after denial of a motion under Pen C §995 to set aside the information or indictment. Although filing a Pen C §995 motion preserves the defendant's right to appeal preliminary hearing irregularities (Pen C §996; *People v Harris* (1967) 67 C2d 866, 870), it is usually preferable to take a writ of prohibition from denial of a Pen C §995 motion because on most issues prejudice is presumed before trial but must be affirmatively shown by the defendant on appeal. See *People v Pompa-Ortiz* (1980) 27 C3d 519, 529.

The grounds that can be raised in a motion to set aside the information or indictment are as follows (Pen C §995):

- That the admissible evidence before the committing magistrate or the grand jury does not furnish a rational ground to establish probable cause to believe that the defendant committed the crime of which he or she is accused (see *Rideout v Superior Court* (1967) 67 C2d 471; *Ghent v Superior Court* (1979) 90 CA3d 944); or
- That the defendant was not legally committed by the magistrate, i.e., there was a denial of a constitutional, statutory, or other important right at the preliminary hearing, in the grand jury proceedings, or in connection with filing the information or indictment. See *People v Pompa-Ortiz*, *supra*; *Jones v Superior Court* (1971) 4 C3d 660; *Jennings v Superior Court* (1967) 66 C2d 867, 874, 880; *Herbert v Superior Court* (1981) 117 CA3d 661.

The writ petition must seek relief on the ground or grounds that were presented to the trial court in the Pen C §995 motion.

**§7.35 a. Time Limitations for Pretrial Relief: Pen C §§999a, 1510**

As a prerequisite to filing a petition on either of the grounds specified in §7.34, the defendant must move to set aside the information or indictment under Pen C §995. See also Pen C §§996–997. If the basis of the motion is lack of probable cause, the following time limits apply:

- The Pen C §995 motion must have been made by the defendant not later than 60 days following arraignment on the information or indictment, unless the defendant was unaware of the issue or had no opportunity to raise it within this time limit (Pen C §1510; *Ghent v Superior Court* (1979) 90 CA3d 944; *Smith v Superior Court* (1978) 76 CA3d 731); and
- The petition must be filed within 15 days after the Pen C §995 motion was denied if the basis for the petition is that the defendant was held to answer or was indicted without reasonable or probable cause (Pen C §999a; *Aydelott v Superior Court* (1970) 7 CA3d 718; *Guerin v Superior Court* (1969) 269 CA2d 80). Unlike Pen C §1510, Pen C §999a permits no exceptions.

Even if the Pen C §999a 15-day time limit does not apply (e.g., because the grounds are that the defendant was illegally committed or denied a substantial right; see discussion in §7.36), under Pen C §1510, the Pen C §995 motion still must have been made within 60 days of arraignment in order to urge its erroneous denial in a petition for writ of prohibition unless the defendant was unaware of the issue or had no opportunity to raise it. Pen C §1510. The 60-day limit may not bar a defendant from making a Pen C §995 motion in the trial court after it has expired. It may only be raised as a bar in the appellate court when the defendant challenges denial of his or her Pen C §995 motion by petitioning for a writ of prohibition; *Ghent v Superior Court* (1979) 90 CA3d 944, 950.

The prescribed time limitation in Pen C §999a runs from the day the Pen C §995 motion is denied to the day the defendant files the petition for pretrial writ. See *Magee v Superior Court* (1973) 34 CA3d 201, disapproved on other grounds in *People v Norris* (1985) 40 C3d 51, 56. By contrast, the prescribed limitation in Pen C §1510 runs from the day the defendant is arraigned to the day he or she makes the Pen C §995 or §1538.5

motion. See *People v Cruz* (1980) 109 CA3d Supp 18 (arraignment is completed in misdemeanor case, for both Pen C §§1510 and 1382 purposes, when defendant is asked to enter plea, not when plea is entered); *Chartuck v Municipal Court* (1975) 50 CA3d 931.

Relief is not foreclosed simply because the Pen C §995 motion was heard and denied more than 60 days after arraignment. In practice, the Pen C §1510 requirement is considered to be satisfied by filing or making the motion within 60 days; the trial court has discretion to decide when to hear and rule on the motion. If the motion is not made until after the 60-day period has elapsed and the defendant challenges an order denying the Pen C §995 motion by filing a petition for extraordinary relief under Pen C §999a, he or she bears the burden of showing that the case fits one of the two exceptions established by Pen C §1510, the existence of which is a question of fact to be determined by the appellate court. *Ghent v Superior Court, supra* (lengthy delay in providing counsel with preliminary hearing transcript came within “no opportunity” exception, excusing delay of 3 days in making motion).

For discussion of when a motion is “made” for purposes of Pen C §1510, see §7.37.

#### **§7.36      b. When §995 Motion Is Based on Illegal Commitment or Denial of Substantial Right**

The Pen C §999a time limitation does not apply if the grounds for the Pen C §995 motion pertain solely to illegal commitment by the magistrate or denial of any substantial right in the preliminary hearing or grand jury proceedings. *Ondarza v Superior Court* (1980) 106 CA3d 195; *Penney v Superior Court* (1972) 28 CA3d 941; *McGonagill v Superior Court* (1963) 214 CA2d 192. This same rule applies to a petition for writ of mandate brought by the people contesting the *granting* of a §995 motion. *People v Superior Court (Calamaras)* (1986) 181 CA3d 901.

In *Ondarza v Superior Court, supra*, the magistrate dismissed a narcotics charge and held the defendant to answer for solicitation and attempt to receive stolen property; the information contained all of the original charges, including the dismissed count. The defendant then challenged the dismissal by a Pen C §995 motion under *Jones v Superior Court* (1971) 4 C3d 660, on the grounds that (1) the magistrate’s refusal to hold the defendant to answer was a binding factual determination, and (2) the drug charge was not transactionally related to the charges for which he was committed. The court of appeal held that filing the petition for prohibition

20 days after denial of the Pen C §995 motion was timely because these contentions fell within the “illegal commitment” category and thus were not subject to Pen C §999a. However, it must be stressed that the usual 60-day “laches” period for seeking relief from superior court rulings will still apply to such petitions for writ. See §7.14.

**§7.37            c. Determining When Motion Has Been Made  
for Purposes of Pen C §1510**

Questions occasionally arise about when a motion has been “made” for the purpose of Pen C §1510. A written motion will probably be considered “made” at the time it is served and filed. See CCP §1005.5. See also *People v Dianda* (1986) 178 CA3d 174 (holding that prosecution’s motion to reinstate felony complaint under Pen C §871.5 was “made” when notice of motion was served and filed). In *Los Angeles Chem. Co. v Superior Court* (1990) 226 CA3d 703, 712, the court held that timely filing of a Pen C §871.5 motion on the last day of the filing period, followed by personal service on the following day, was “substantial compliance” with the statutory filing deadline.

**NOTE►** A Pen C §995 motion may be made orally, without formal written notice. If counsel intends to seek pretrial writ relief from the denial of an *oral* §995 motion, the motion should be made in time to ensure that it will actually be heard within the 60-day period set forth in Pen C §1510. Making a formal *written* motion within the 60-day limit will avoid litigation about when the motion was made. For discussion of writ review of orally noticed Pen C §1538.5 motions, see *Smith v Superior Court* (1978) 76 CA3d 731 in §7.22.

**§7.38            d. Time Limitations on Nonstatutory Motion  
to Dismiss for Errors Committed During  
Preliminary Hearing Not Appearing on  
Face of Transcript**

The court of appeal has authorized the use of a nonstatutory motion to dismiss for errors committed during a preliminary hearing that do not appear on the face of the transcript. *Stanton v Superior Court* (1987) 193 CA3d 265. Because the motion is “nonstatutory,” no statutory time limits apply to it. Thus, if such a motion is brought, there appears to be no bar to writ review under Pen C §1510, even if the motion is delayed, and no limits under Pen C §999a. The only time limit that seems applicable is the



general requirement that writ petitions from the superior court be filed within 60 days of the superior court's order.

### **§7.39 e. Review of Pen C §871.5 Ruling**

Penal Code §871.5 provides that the prosecution can seek review of a magistrate's ruling dismissing all or part of a complaint by filing a motion to reinstate the dismissed matter in the superior court. The prosecution *may* appeal the denial of a motion for reinstatement under Pen C §1238; the defendant *may not* appeal the reinstatement order. Pen Code §871.5(f). The only way for a defendant to obtain review is with a motion to dismiss under Pen C §995 and a petition for writ of prohibition in the court of appeal if the Pen C §995 motion is denied. Pen Code §871.5(f). For further discussion of Pen C §871.5, see §1.28.

## **2. Other Uses of Prohibition**

### **§7.40 a. Pre-Preliminary Hearing Issues**

Prohibition is a proper vehicle for deciding whether a preliminary hearing may be conducted over a defendant's protest or, conversely, whether it must be conducted on a defendant's request in the face of a refusal to conduct a hearing. In *Leaming v Municipal Court* (1974) 12 C3d 813, the petitioner unsuccessfully used prohibition to test whether the alleged felony was only a misdemeanor for which there was no jurisdiction to hold a preliminary hearing. In *Hale v Superior Court* (1975) 15 C3d 221, the defendant successfully sought to restrain the holding of competency proceedings (see Pen C §§1367–1376) until a probable cause determination was made at a preliminary hearing or by a grand jury. Similarly, a defendant who wanted a preliminary hearing and therefore did not want the charge against him reduced to a misdemeanor under Pen C §17(b)(5) (see California Criminal Law Procedure and Practice §7.12 (Cal CEB)) was successful in *Larson v Municipal Court* (1974) 41 CA3d 360. A defendant was unsuccessful, however, in his attempt to invoke Pen C §17(b) to compel the prosecutor to file a Pen C §270 misdemeanor complaint as a felony in *Metcalfe v Municipal Court* (1981) 125 CA3d 303. The court reasoned that Pen C §17(b)(4) did not apply because the conduct charged was solely a misdemeanor.

### **§7.41 b. Double Jeopardy**

Since *Jackson v Superior Court* (1937) 10 C2d 350, prohibition has been recognized as the proper remedy to prevent retrial after a defendant

has been once in jeopardy. See *Curry v Superior Court* (1970) 2 C3d 707; *Paulson v Superior Court* (1962) 58 C2d 1. The defendant must have sought leave to enter a plea of former jeopardy (see *Bunnell v Superior Court* (1975) 13 C3d 592) or have entered the plea under Pen C §§1016–1017 in order to obtain writ review of the issue. *Gonzalez v Municipal Court* (1973) 32 CA3d 706.

### §7.42 c. Multiple Prosecution

Prohibition lies to restrain proceedings in violation of the bar against multiple prosecutions for the same act under the doctrine of *Kellett v Superior Court* (1966) 63 C2d 822. Pen C §654. Similarly, the writ can be used to prevent trial for an offense previously dismissed under Pen C §1387 that is not subject to further prosecution. See *Malone v Superior Court* (1975) 47 CA3d 313.

### §7.43 d. Statute Unconstitutional; Offense Is Not Crime

Prohibition is available to terminate a prosecution for violation of a statute or ordinance that is unconstitutional. *Rockwell v Superior Court* (1976) 18 C3d 420, 427. A pleading that does not state a public offense may be restrained by a writ of prohibition. Some examples are:

- The charged criminal statute or ordinance is alleged to be unconstitutional on its face, *e.g.*, under the free speech or assembly provisions of US Const amend I and Cal Const art I, §§2–3. See *Pryor v Municipal Court* (1979) 25 C3d 238; *Dulaney v Municipal Court* (1974) 11 C3d 77; *Hunter v Justice's Court* (1950) 36 C2d 315; *Rescue Army v Municipal Court* (1946) 28 C2d 460.
- The complaint (or other accusatory pleading) does not state a public offense. *Sobiek v Superior Court* (1972) 28 CA3d 846 (statute of limitations). A typical example occurs when the local ordinance for which the defendant is being prosecuted conflicts with and has been preempted by state legislation rendering it void under Cal Const art XI, §7. *Whitney v Municipal Court* (1962) 58 C2d 907. See *Lancaster v Municipal Court* (1972) 6 C3d 805. But see *Yuen v Municipal Court* (1975) 52 CA3d 351 (ordinance found constitutional).

Even if the ordinance or statute is valid in some aspects, prohibition lies if the defendant's conduct was not within the scope of the ordinance or

statute. *Kelly v Municipal Court* (1958) 160 CA2d 38; *Cleland v Superior Court* (1942) 52 CA2d 530 (state hospital superintendent not “officer” under Pen C §71). Inasmuch as this type of case involves a statute valid on its face, the objection in the trial court by way of demurrer or motion to dismiss and the petition for writ must include factual allegations that do not appear in the charging document and are not contested by opposing counsel. See *Mandel v Municipal Court* (1969) 276 CA2d 649 (crime report attached to complaint). If such facts are disputed, a triable issue is ordinarily presented and pretrial review usually will be denied. See *Dickenson v Municipal Court* (1958) 162 CA2d 85. Compare *Ross v Municipal Court* (1975) 49 CA3d 575 (writ denied), with *Rice v Superior Court* (1975) 49 CA3d 200 (writ granted).

The petition for writ may be based on the dual grounds of unconstitutionality and failure to state a cause of action. *Mandel v Municipal Court*, *supra* (loitering under former Pen C §653g); *Moore v Municipal Court* (1959) 170 CA2d 548 (regulations promulgated by fire district).

Petitioner may seek review in the United States Supreme Court of denial of a pretrial writ petition challenging an unconstitutional statute. See, e.g., *Camara v Municipal Court* (1967) 387 US 523, 87 S Ct 1727. On procedures for seeking review in the United States Supreme Court by writ of certiorari, see chap 12.

### §7.44 3. Miscellaneous Uses

Examples of some other grounds for which a writ of prohibition may issue are:

- **Improper prosecutorial discovery.** Used to block a court order requiring the defendant to give the prosecution unauthorized or unenforceable discovery. *Allen v Superior Court* (1976) 18 C3d 520; *Reynolds v Superior Court* (1974) 12 C3d 834.
- **Material informer unavailable.** Used to compel dismissal when the prosecution fails to make reasonable effort to locate an informer who is a material witness. See *Eleazer v Superior Court* (1970) 1 C3d 847.
- **Violation of attorney-client relationship by state.** An undercover police officer posing as a codefendant attended confidential attorney-client meetings. Such intrusion through trickery violated the defendants’ constitutional right to communicate privately with counsel. *Barber v Municipal Court* (1979) 24 C3d 742.

- **Challenge jury panel.** Used to challenge the unconstitutional composition of a grand or petit jury panel. *Montez v Superior Court* (1970) 10 CA3d 343. But see *Ganz v Justice Court* (1969) 273 CA2d 612 (writ available only in “unusual cases”).
- **Contempt.** Contempt orders are final, nonappealable orders. CCP §1222. They are often challenged by petition for writ of habeas corpus (see *In re Littlefield* (1993) 5 C4th 122) or petition for writ of certiorari (*Boysaw v Superior Court* (2000) 23 C4th 215); however, they may also be challenged by petition for writ of prohibition. *Lister v Superior Court* (1979) 98 CA3d 64, 69; *Hanson v Superior Court* (2001) 91 CA4th 75, 80 n1; *Bellas v Superior Court* (2000) 85 CA4th 636, 642 n5 (petitioner sought habeas corpus; court issued writ of prohibition).
- **Compel election between appeal and new prosecution.** Used to force the prosecution to elect between pursuing an appeal from dismissal on a Pen C §995 motion or to proceed by a new information or indictment. See Pen C §1387 (Pen C §995 dismissal terminates action). See also *Anderson v Superior Court* (1967) 66 C2d 863.
- **Certification of juvenile to adult court.** Used to block an order of a juvenile court finding a minor accused of a crime under Welf & I C §602 unfit for treatment within juvenile court facilities and certifiable for criminal proceedings as an adult (see Welf & I C §707). Such an order is reviewable only by immediate application for a writ of prohibition or mandate. The order cannot be challenged either by motion in superior court under Pen C §995 or on appeal after conviction. *People v Chi Ko Wong* (1976) 18 C3d 698, disapproved on other grounds in *People v Green* (1980) 27 C3d 1, 34. The petition for such writ must be filed within 20 days *after* arraignment on the first accusatory pleading (a felony complaint or grand jury indictment) based on the allegations leading to the unfitness determination. Cal Rules of Ct 5.770(i), 5.772(j). Corollary review of a finding of fitness is permitted to the prosecution in a proper case of abuse of discretion, before jeopardy attaches, on commencement of the Welf & I C §602 hearing. *People v Superior Court (Steven S.)* (1981) 119 CA3d 162. See *In re Richard C.* (1979) 89 CA3d 477, 484.
- **Unconstitutionally vague pleadings.** Prohibition was used to compel the prosecution to give adequate notice of what act or acts the

prosecution intended to rely on to prove charges of practicing psychology without a license and related offenses. *Peer v Municipal Court* (1982) 128 CA3d 733.