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1. *1-1 CA Preliminary Examinations, 995 Benchbook 1.1*
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California Preliminary Examinations, 995 Benchbook > CHAPTER 1 THE TIMING OF THE HEARING

1.1 THE RIGHT TO A SPEEDY HEARING

PenC § 859b At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with § 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in § 859, shall set a time for the examination of the case and shall allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. The magistrate shall also issue subpoenas, duly subscribed, for witnesses within the state, required either by the prosecution or the defense.

Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in § 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated pursuant to Chapter 6 (commencing with § 1367) of Title 10 of Part 2.

Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with § 1367) of Title 10 of Part 2, and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur:

(a) The defendant personally waives his or her right to preliminary examination within the 10 court days.

(b) The prosecution establishes good cause for a continuance beyond the 10-court-day period.

For purposes of this subdivision, “good cause” includes, but is not limited to, those cases involving allegations that a violation of one or more of the sections specified in subdivision (a) of § 11165.1 or in § 11165.6 has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. Any continuance under this paragraph shall be limited to a maximum of three additional court days.

If the preliminary examination is set or continued beyond the 10-court-day period, the defendant shall be released pursuant to § 1318 unless:

(1) The defendant requests the setting of continuance of the preliminary examination beyond the 10-court-day period.

(2) The defendant is charged with a capital offense in a cause where the proof is evident and the presumption great.

(3) A witness necessary for the preliminary examination is unavailable due to the actions of the defendant.

(4) The illness of counsel.

(5) The unexpected engagement of counsel in a jury trial.

(6) Unforeseen conflicts of interest which require appointment of new counsel.

The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with § 1367) of Title 10 of Part 2, unless the defendant personally waives his or her right to a preliminary examination within the 60 days.

NOTES

1.1.1 Time to prepare for hearing.

The first paragraph of section 859b requires that the parties be given at least two days after the arraignment to prepare for the hearing. However, this does not require a continuance if at the time of the hearing a prosecution motion to add a charge is granted, though the defendant is then re-arraigned. Such factors as the significance of the amendment and the surprise of defense counsel should be taken into account. In *People v. Castaneda, 190 Cal. App. 3d 961 (1987)*, the court found the language in this paragraph requiring a two-day preparation period directory, not mandatory.

1.1.2 10-court-day rule: non-custody defendants.

The second paragraph provides that both sides are entitled to a hearing within 10 court days of entry of a plea unless good cause for a delay exists or both sides waive the right.

NOTE:
There is no requirement that the defendant be in custody.

NOTE:
Despite the mandatory language contained in this paragraph, **there is no penalty for failure to provide this right**.

When read in conjunction with paragraph three, it seems clear that a case should not be dismissed for violating the requirements of paragraph two. A contrary result would render nonsensical the requirements of paragraph three that a failure to provide a hearing within 10 court days leads to a dismissal only under certain stated conditions. In fact, in 1981, the Legislature amended paragraph three to add additional conditions before dismissal was appropriate (Specifically, that the "… defendant has remained in custody … solely on that complaint"). This would have been unnecessary if a violation of paragraph two led to a dismissal.

There are other Penal Code provisions that provide rights to defendants without remedies for their violation and it is submitted that paragraph two should be interpreted in a like manner. For example, *Penal Code § 825* provides that a person arrested has the right to be brought before a magistrate "… without unnecessary delay, and, in any event, within two days after his or her arrest." No remedy is provided for a violation of this provision, and it is clear that none exists unless the defendant demonstrates that he was prejudiced by the delay (*People v. Pettingill, 21 Cal. 3d 231, 244 (1978)*; *People v. Combes, 56 Cal. 2d 135, 142 (1961)*; ***cf.*** *People v. Richardson, 43 Cal. 4th 959, 990–991 (2008)*. Thus, regarding the second paragraph of § 859b, **if the court sets a preliminary hearing for an out-of-custody defendant beyond 10 court days without his consent, no penalty should be imposed unless the defendant demonstrates that actual prejudice resulted to him from the delay** (*See People v. Luu, 209 Cal. App. 3d 1399 (1989)*). However, as with § 825, the courts should make every effort to provide an out-of-custody defendant with the right granted in the second paragraph (*See People v. Mesaris, 201 Cal. App. 3d 1377 (1988)*, citing this text as authority).

1.1.3 10-court-day rule: in-custody defendants.

The third paragraph relates to in-custody defendants. It states that a failure to provide them with a hearing within 10 court days requires dismissal of the charges if the defendant has remained in custody for the 10-court-day period solely on the complaint and there is no good cause for the delay. Thus, if the defendant is in custody on other pending cases, he is not entitled to a dismissal under this paragraph but must rely on the 60-day rule (*Ng v. Superior Court, 4 Cal. 4th 29, 38 (1992)*). There has been no judicial interpretation of the phrase "solely on that complaint." A narrow construction would mean that a parole or probation hold based on the

same criminal conduct charged in the complaint would preclude reliance on the 10-day rule. A better interpretation would deny the protection of this rule only if the hold was based on other misconduct. Prior to the inclusion of this phrase in the statute, *Blake v. Superior Court, 108 Cal. App. 3d 244 (1980)*, held that the 10-day rule, which then applied "whenever the defendant is in custody," was designed to require adjudication of the probability of criminality without prolonged incarceration. The defendant in *Blake*, who had already been sentenced to state prison on unrelated charges, was obviously outside the statute's goal and was denied its protection. A defendant in custody on a parole or probation hold based on the pending criminal case is, however, in the opposite situation.

1.1.4 10-court-day rule: must be in custody 10 or more court days.

A defendant is entitled to a dismissal only if he or she "has remained in custody for 10 or more court days." This rule differs from that contained in the speedy trial statute, which grants a misdemeanor defendant a preferred trial setting if in custody at the arraignment, even if the accused later bails out (*See* *Pen. Code, § 1382(3)*). Thus, a defendant who was in custody at the arraignment, but is released from custody in less than 10 court days, cannot demand a dismissal if the preliminary hearing is held after the 10th court day.

1.1.5 10-court-day rule: personal waiver required.

A waiver by the defense of the 10-court-day rule set out in paragraph three cannot be made by the attorney alone; the language of that paragraph states that the defendant must personally enter it. This would seem to mean that the defense need not object to a setting beyond the statutory period in order to preserve its right to move for a dismissal. Language to the contrary in *Serrato v. Superior Court, 76 Cal. App. 3d 459, 466–467 (1978)*, should be disregarded because it interpreted an earlier version of this statute that did not clearly require the defendant's personal waiver.

1.1.6 Own recognizance release resulting from delay; exceptions.

Even if the defendant is not entitled to a dismissal when the hearing is set beyond 10 court days because the prosecution shows good cause or he is in custody on another matter, he **would be entitled to be released on his or her own recognizance (O.R.) unless one of six stated exceptions applies**. In *People v. Standish, 38 Cal. 4th 858, 869–882 (2006)*, the California Supreme Court concluded that there is no additional implied exception providing the magistrate with the discretion to deny O.R. release on public safety grounds. *Standish* also concluded, however, that on a 995 motion, the superior court may not set aside the information simply because the magistrate improperly refused to grant an O.R. release to an in-custody defendant, in the absence of a determination that the error might have affected the outcome of the preliminary examination (*Standish, 38 Cal. 4th at 882–887*).

When a defendant has been granted an O.R. release under section 859b, that release applies only to the limited period between the order granting the continuance and the conclusion of the preliminary examination; the O.R. status may be revoked after the defendant has been held to answer or the information has been filed (*Standish, 38 Cal. 4th at 883* and fn. 8). If the defendant declines to be released, this does not prevent the court from continuing the hearing to a later date, if this continuance is otherwise justified.

> **NOTE:**
> Exceptions (2) and (3) to the O.R. release provision may present proof problems for the court.

Exception (2) [The defendant is charged with a capital offense in a case where the proof is evident and the presumption great.] This exception **simply restates the historic exception to bail in this state** contained both in the *California Constitution (Art. I, § 12*) and in *Penal Code § 1268a(a)*. The standard "proof is evident or the presumption great" has been interpreted to mean that amount of evidence sufficient to "sustain a capital conviction if pronounced by a jury" (*In re Troia, 64 Cal. 152 (1883)*). **This is, of course, far less than proof**

beyond a reasonable doubt. To determine if this exception has been established, the magistrate must conduct a hearing (*See* *Clark v. Superior Court, 11 Cal. App. 4th 455, 457–459 (1992))*.

It seems unlikely that the Legislature intended that an objection to an O.R. release under § 859b would occasion the holding of a pre-preliminary examination hearing where the prosecution would be required to present testimony from witnesses to the homicide. A better approach can be found in *In re Walters, 15 Cal. 3d 738 (1975)*. *Walters* considered the procedures mandated by *Gerstein v. Pugh, 420 U.S. 103 (1975)*, for deciding if probable cause exists to hold a defendant in jail pending trial where no preliminary examination has been held. The court found that an adversary proceeding was unnecessary as long as fair and reliable methods were used to determine a probability of guilt. Without precluding other methods, it specifically approved the court's reliance on the information contained in a police report "stated upon the personal knowledge of the party who makes the report or upon the information and belief of such person who further states the bases for his information and belief and other facts which demonstrate the trustworthiness of such information" (*In re Walters, 15 Cal. 3d at 751*). **A magistrate should be permitted to follow a similar procedure in deciding if exception (2) to an O.R. release exists.**

NOTE:

This same approach should govern the magistrate's consideration of exception (3).

Exception (3) [A witness necessary for the preliminary examination is unavailable due to the actions of the defendant.] There are two typical situations that will lead the prosecutor to rely on this exception in arguing against a release. In the first, a victim of a violent crime is unavailable because he or she is still recuperating from injuries inflicted in the incident. While there may be no dispute that the missing witness is, in fact, recuperating, the identity of the individual who inflicted the injuries may be the very issue in the case. As with exception (2), it is unlikely that the Legislature intended a mini-preliminary examination to determine that the unavailability is "due to the actions of the defendant." Rather, the procedures approved in *Walters* should be utilized.

The second situation likely to arise under exception (3) is somewhat more difficult. Here, the prosecutor relates that a witness has informed law enforcement authorities that he or she will not appear because of threats received from the defendant. While the *Walters* approach still seems best, a magistrate should be reluctant to find that the victim's hearsay statements are enough not only to lodge the charge and delay the hearing but to leave the defendant in custody for up to 60 days as well. The fair and reliable procedures mandated by *Walters* may well require testimony corroborating the threats before a release is denied.

Exception for jointly charged defendants. In *In re Samano, 31 Cal. App. 4th 984, 991–993 (1995)*, cited with approval in *People v. Standish, 38 Cal. 4th 858, 872–873 (2006)*, the court held that the automatic O.R. provisions of § 859b do not apply to one jointly charged defendant when a second defendant has established good cause for a continuance of the preliminary examination. In effect, the right to deny O.R. release to one defendant extends to all when § 1050.1 applies. Section 1050.1 is set out in Note 1.1.21. The court achieved this result, over a dissent, by interpreting the word "defendant" in the first exception to the O.R. release provisions "to mean all jointly charged defendants" (*In re Samano, 31 Cal. App. 4th at 992–993*). In *Ramos v. Superior Court, 146 Cal. App. 4th 719 (2007)*, the court questioned *Samano* as creating "an unauthorized exception to section 859b's mandatory release provision." (*Ramos, 146 Cal. App. 4th at 733*).

1.1.7 O.R. release in violent felony cases.

Penal Code § 1319 limits O.R. releases in violent felony cases, as defined in *Penal Code § 667.5*. It provides that no such release is to occur without notice to the prosecutor. It further provides that an O.R. release is to be denied "… where it appears by clear and convincing evidence that [the accused] previously has been charged with a felony offense and has willfully and without excuse from the court failed to appear in court as required …." A decision granting or denying O.R. release under this section must be accompanied by a statement of reasons that is to be included in the court's minutes.

Penal Code § 1319.5 precludes O.R. releases in certain other cases until a hearing is held in open court before the magistrate or judge. This section applies (1) to a defendant currently on felony probation or parole, and (2) to anyone who has had a warrant issued for failure to appear in court three or more times during the three years preceding the arrest (except for Vehicle Code infractions), and who is arrested for any of the following offenses:

(A) Any felony offense.

(B) Any violation of the California Street Terrorism Enforcement and Prevention Act (Chapter 11—commencing with § 186.20—of Title 7 of Part 1).

(C) Any violation of Chapter 9 (commencing with § 240) of Title 7 of Part 1.

(D) A violation of § 484 (theft).

(E) A violation of § 459 (burglary).

(F) Any offense in which the defendant is alleged to have been armed with or to have personally used a firearm.

1.1.8 Setting bail: reading arrest reports.

With certain exceptions, a judge is not permitted to read an arrest report (*Pen. Code, § 1204.5*). One of these exceptions occurs when the judge is setting bail.

In *O'Neal v. Superior Court, 185 Cal. App. 3d 1086 (1986)*, the defense contended that a judge who relied on such a report to set bail should not be permitted to preside over the preliminary examination. While conceding that it was preferable to have different judges preside over the two proceedings, the Court of Appeal rejected the defendant's argument and found that the judge who read the report while setting bail could also serve as the magistrate at the examination.

1.1.9 Setting bail: automatic review.

Effective January 1, 1987, the Legislature added § 1270.2 to the Penal Code. This section provides that **a defendant in custody on bail has a right to an automatic review of the amount set within five days of the setting**. § 1270.2 simply restates the rule of former § 1271, which was inadvertently repealed on December 31, 1985.

1.1.10 Setting bail: Proposition 4 standards.

In 1982, the California voters approved Proposition 4, which amended *Article I, § 12 of the California Constitution* to read:

A person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evident or the presumption great;

(b) Felony offenses involving acts of violence on another person when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion.

1.1.11 60-day rule: all defendants.

The final paragraph of § 859b provides that all defendants are entitled to a dismissal if the hearing is not held within 60 days unless the defendant personally waives the right (*See* *People v. Mackey, 176 Cal. App. 3d 177 (1985))*. This rule differs from the 10-court-day rule in several ways:

(1) **The time limit is 60 days, not 60 court days.**

(2) **Even if there is good cause for a delay beyond 60 days, the complaint must be dismissed.** However, in such cases, the dismissal does not count as one of the two dismissals permitted under § 1387 (*See* *Pen. Code, § 1387*(c)(1) discussed in Note 4.4.4). It seems wise for the prosecutor to put the reasons for the delay on the record before the magistrate dismisses the case. This will make it easier to respond to a defense motion to dismiss a later refiling based on a violation of § 1387. However, the decision as to whether this reason constitutes good cause and, therefore, permits a later refiling, should not be made until that refiling occurs (*Compare* *People v. Ybarra, 206 Cal. App. 3d 546 (1988))*.

(3) **The defendant is entitled to the protection of this rule even if he is in custody on other matters or out of custody.** In its treatment of the 10-court-day rule, the Legislature indicated that it knew how to impose such limitations if it desired to do so. Language in *People v. Williams, 194 Cal. App. 3d 124 (1987)*, however, contradicts this conclusion. In *Williams*, the defendant was a federal prisoner in Missouri who had pending California charges. He demanded trial on them within 180 days, as provided by *Penal Code § 1389*, and was returned to this state. When the municipal court failed to provide a preliminary hearing within 60 days of the arraignment, the magistrate dismissed the charges. On appeal, this decision was reversed with language that suggests that the rights to a speedy arraignment and examination are available only to defendants in custody solely on the felony complaint. The absence of such limiting language in the statutes was ignored. It is submitted that the decision in *Williams* can be justified without imposing these implied limitations on the 60-day rule. Most defendants have rights to a speedy hearing under § 859b and a speedy trial under § 1382. The latter does not begin to run until the defendant has been held to answer and an information filed in superior court. As a federal prisoner, however, Williams' speedy trial rights were governed by the Interstate Agreement on Detainers, *Penal Code § 1389*. **This Agreement provides that the defendant must be tried within 180 days of serving a written demand on the appropriate prosecutor's office. It would appear that this should override not only the normal speedy trial limit but the normal speedy hearing limit as well. Thus, the decision in *Williams* seems correct, though the language in it sharply restricting the protection of the 60-day rule should be considered dicta.** See also the discussion in Note 1.1.26.

1.1.12 Example of relationship of dismissal and O.R. release provisions.

One common situation has often raised questions. A defendant is in custody on another case in addition to the felony. The hearing is set within 10 court days, but on the day set, the prosecution, without good cause, is unable to proceed. This section should be applied as follows: The third paragraph does not entitle the defendant to a dismissal because he is not in custody "solely on that complaint." Pursuant to the next paragraph, the defendant is to be released under § 1318 on the felony case unless one of the stated exceptions applies. He would, of course, remain in custody on the other matter(s). Finally, pursuant to the last paragraph, the case would have to be dismissed if the prosecutor could not proceed within 60 days.

Another common situation arises when the prosecution realizes it will be unable to proceed within 10 court days following the arraignment of an in-custody defendant, and it requests that the court release the accused on his own recognizance. The goal, of course, is to delay the hearing without good cause to continue and without providing the defendant with the right to a dismissal. If the O.R. is granted, no dismissal occurs, even if the hearing is set or continued beyond 10 court days, because the defendant is not in custody (*See* Note 1.1.4). If the O.R. is granted, the prosecution should be able to delay the hearing, without proof of good cause, so long as it occurs within 60 days of the arraignment (*See* Note 1.1.15). What if the defendant objects? Though the court has discretion to deny the prosecution's request for the O.R., there is no reason that it should do so simply to provide the defendant with an early dismissal. The speedy hearing and O.R. rules contained in § 859b should be read together to ensure that a defendant is not kept in custody for more than 10 court days awaiting the hearing. Offering an O.R. release to the defendant accomplishes this goal even if the defendant declines to be released.

1.1.13 Effect of amendment of complaint.

An amendment to the complaint prior to the date set for the examination will not start a new period running unless it is "an amendment of substance [that] would constitute a new charge" (*Hankla v. Municipal Court, 26 Cal. App. 3d 342 (1972))*. An amendment that simply changes charges leaving the times, dates, and victims unaltered does not substantively change the issues and does not toll the running of the statutory time (*Perez v. Superior Court, 111 Cal. App. 3d 994 (1980))*. It is noteworthy that neither *Hankla* nor *Perez* found that the amendment involved was one "of substance." No case citing either *Hankla* or *Perez* has concluded that any specific amendment to the accusatory pleading justified restarting the statutory period. And, *Hankla* and *Perez* provide no explanation for automatically delaying the trial for an amendment of substance. There seems little reason to doubt that an amendment to the information or indictment *might* provide good cause for a delay in the trial court. But, it is unclear why any amendment should automatically justify a delay in the trial without regard to whether good cause exists.

Assuming *Hankla* and *Perez* correctly state the law regarding trials, should an amendment of substance to the criminal complaint automatically start a new period running for the preliminary examination? In previous editions, this Note took the position it should (*People v. Ramos, 146 Cal. App. 4th 719, 724 fn. 3, 53 Cal. Rptr. 3d 189 (2007)*, citing this text and leaving the issue to be resolved in a subsequent case; *People v. Clark, 63 Cal. 4th 522, 552 (2016)* [noting this issue as still unresolved]). In resolving this question, it is important to consider that the 60-day speedy preliminary examination rule in section 859b has no good cause exception (See the discussion in Note 1.1.11). Therefore, the option of substituting a good cause test for the rule stated in *Hankla* and *Perez* does not exist in the preliminary examination context. In this respect the *Hankla/Perez* approach might be more justified with preliminary examinations than trials. On the other hand, it seems unwise to extend *Hankla/Perez* in the absence of concrete examples of "amendments of substance" and without a clear articulation of the interests served by this rule.

1.1.14 County special holidays.

People v. Pickens, 124 Cal. App. 3d 800 (1981), **provides that a county special holiday counts as a court day**. All state holidays are listed in *Government Code section 6700*.

1.1.15 Prosecution continuance motion without good cause: to a date within statutory period.

As the foregoing has explained, a defendant is entitled to the protection of either the 10-day or 60-day rule or both. Once a hearing date has been set, a motion to continue by the prosecution may arise in various contexts. First, consider a situation where the hearing is set within the appropriate statutory time and, without good cause, the prosecution seeks a continuance to a date still within that time period. Does the magistrate have discretion to grant it? *Penal Code § 1050* sets forth the general rule on continuances. As modified in 1986, subsection (b) requires written notice of the motion at least two court days before the hearing. Failure to provide such notice without good cause may lead to sanctions (subsection (c)) or denial of the motion (subsection (d)). **The continuance shall be granted only if the court makes a finding of good cause and states on the record and enters in the minutes the facts that justify such a finding. Subsection (k), however, clearly provides that the requirements of § 1050 do not apply when either party seeks a continuance within the 10-court-day period. Thus, the magistrate clearly has discretion to continue without good cause during the 10-court-day period. Defense motions to continue within the statutory period without good cause should be given the same consideration as prosecution motions.** (*See Pen. Code, § 1050(k)*; *Wizar v. Superior Court, 124 Cal. App. 3d 190 (1981)*).

In *People v. Smith, 245 Cal. App. 4th 869 (2016)*, the defendant was diverted on charges of heroin possession. After failing to meet the conditions of the diversion program, he entered a plea of not guilty and refused to waive the 10-court-day rule set out in section 859b. That section provides that the hearing must be set within the proper period after "the date the defendant is arraigned *or pleads*." Section 1050(k), however, eliminates the limits of section 1050 when a party seeks a continuance within the 10-day period after the date of "the defendant's arraignment." *Smith* interpreted section 1050 (k) consistently with section 859b and applied 1050 (k) to "run from the date of either arraignment or plea." (*Smith, 245 Cal. App. 4th at p. 875* [finding section 1050 (k) permitted a continuance to the 10th day without regard to the notice and good cause limits of section 1050].)

Assume, however, an out-of-custody defendant whose hearing is set 30 days after the entry of the plea. On that day, no courtrooms are available (which does not constitute good cause, *see* Note 1.1.18) and, over the defendant's objection, a several days' delay is sought. The absence of a reference to the 60-day rule in § 1050(k) could be interpreted as precluding the continuance and requiring a dismissal. Logic should dictate a contrary result. Obviously, the hearing could originally have been set 35 days after the plea; what harm results from getting there in two steps? Moreover, the rule here should be the same as the one in the speedy trial area. It is not uncommon for courts to set the trial less than 60 days from the filing of the information so that a grace period exists. In *People v. Rubaum, 110 Cal. App. 3d 930 (1980)*, the Court of Appeal discussed the relationship between § 1050, which requires good cause for any continuance, and § 1382, which requires a dismissal only if the statutory trial period is exceeded. *Rubaum* held that the latter prevailed and good cause was not required to continue a case within the statutory period. *See also* *Malengo v. Municipal Court, 56 Cal. 2d 813 (1961)*.

In a strangely reasoned decision, the Court of Appeal ruled, however, that § 859b does not override § 1050 (*People v. Alvarez, 208 Cal. App. 3d 567 (1989)*). The court concluded that good cause had to be shown to continue a hearing within the 60-day statutory period and, if the continuance was denied and the prosecution could not proceed, "§ 871 specifically provides the magistrate with the authority to dismiss the action if 'there is not sufficient cause to believe the defendant guilty of a public offense …' " (*Alvarez, 208 Cal. App. 3d at 577*). The *Alvarez* court never noted that a contrary rule applied in the speedy trial area or suggested a reason for the disparity. The court appeared unwilling, however, to accept the logic of its own conclusion: that the failure to show good cause mandates a dismissal. It stated that "[i]n addition to those sanctions specified in 1050.5, if the magistrate denies the motion for continuance and the People are unable to proceed, the court *may* dismiss …" (emphasis added). This would seem to leave to the magistrate's discretion the power to grant a continuance without good cause, a good result even if obtained by a logic both tortured and obscure. In 2003, the Legislature amended sections 1050 and 1050.5 to ensure that a violation of section 1050 did not lead to a dismissal of the case when the trial is conducted within the statutory period (*People v. Henderson, 115 Cal. App. 4th 922, 934–936 (2004)*).

Henderson applied the logic of the speedy trial cases (interpreting section 1382) to the speedy preliminary hearing rule (section 859b). "[B]oth sections 1382 and 859b establish statutory limits to safeguard a defendant's constitutional right to a speedy trial. As has been said about the statutory limits in section 1382, the statutory periods established in section 859b indicate a legislative policy that such periods constitute a reasonable time. In the speedy trial cases, the courts have held that a criminal case, based on society's legitimate interest in prosecuting crimes, should not be subject to dismissal where the People have asked to continue the case to a date within the statutory period. We see no reason to limit this holding to the speedy trial cases." (*Henderson, 115 Cal. App. 4th at 939*.)

1.1.16 Prosecution continuance motion without good cause: after defendant has entered limited time waiver.

The prosecution's motion to continue without good cause may arise in a different context. If a defendant entitled to the protection of the 10-court-day rule enters a limited time waiver and agrees to a hearing three weeks from entry of the plea, what is the result of the prosecution's inability to proceed at that time without good cause? It could be argued that once the 10-day protection is waived, the defendant is left with only the 60-day rule to rely on. This result would, presumably, reduce the willingness of defendants to enter into short time waivers, which can be useful to courts with crowded dockets. Alternatively, it could be argued that once the 10-day protection is waived, that waiver is complete until the defendant withdraws it and demands a speedy hearing. This, in effect, would give the prosecutor an additional 10 court days to obtain the witnesses. The problem with this alternative is that it grants to the prosecutor a grace period similar to the one given in a trial context by § 1382 without the specific enabling language contained in that section. If this problem is faced in the Court of Appeal, it is likely that it will follow neither of these two possible approaches. Rather, the court will adopt a case-by-case approach that focuses on the precise comments made by the defendant. Based on that analysis, the court could conclude the defendant was waiving time *only* until the next date specified or was waiving, completely, the protection of the 10-(or, even, the 60-) day rule. **The safest course for the magistrate to take when defendants waive the protection of the statutory period is to require that the waiver include several**

days beyond the date set for hearing. This will eliminate any ambiguity and reduce the risk of dismissal if unforeseen problems arise. In a related area, in *People v. Griffin, 235 Cal. App. 3d 1740 (1991)*, the court assumed the propriety of a nonstatutory 15-day grace period to extend the trial date in a felony case, where the defendant consents.

1.1.17 Setting the hearing after an open-ended time waiver.

A different problem exists when a defendant enters into an open-ended time waiver, i.e., he waives time and a new court date is set, but not a date for the preliminary examination. If on that date the parties' expectations of a disposition are not met and the defendant seeks to withdraw his time waiver and set a hearing date, what is the result? Alternatively, if the defendant fails to appear on that date and, following his or her arrest, seeks to withdraw the time waiver, what is the result? In *People v. Love, 132 Cal. App. 4th 276 (2005)*, the court was confronted with a defendant who had waived her 10- and 60-day rights to a speedy preliminary hearing and then failed to appear at the next date. She was taken into custody five months later and had a preliminary hearing set within three weeks. *Love* rejected the defendant's argument that she had a right to this hearing within 10 court days following her re-appearance in court.

Love rested its decision on a distinction between section 1382, the speedy trial statute, and section 859b, the speedy preliminary hearing statute. Section 1382 specifically authorizes a defendant to withdraw a previously entered waiver of time (§ 1382, subd. (a)(2)(A)) and specifically provides that when a defendant fails to appear "after being held to answer" and a bench warrant is issued, "the defendant shall be brought to trial within 60 days after the defendant next appears in the superior court unless a trial date previously had been set which is beyond that 60-day period." (§ 1382, subd. (b)). Since neither of these contingencies had been provided for in section 859b, *Love* concluded that following the express waiver of her 10- and 60-day rights, the defendant retains only the protection of her constitutional speedy trial rights. (*Love, 132 Cal. App. 4th at p. 286*.)

1.1.18 What constitutes good cause: judges unavailable; motions to disqualify the judge.

When the prosecution has good cause for a delay, it is entitled to a continuance up to the limits of the 60-day rule, even if the defendant objects. Note that while the statute provides a good cause exception to the 10-court-day rule, it provides no such exception to the 60-day rule. There are numerous cases discussing what constitutes good cause for delay of a trial under *Penal Code § 1382* and for delay of a preliminary hearing under § 859b.

In *Stroud v. Superior Court, 23 Cal. 4th 952, 969–970 (2000)*, the California Supreme Court provided the following comment on delays caused by judicial scheduling conflicts: "Scrutiny of the case law suggests that the determination whether delays caused by judicial schedule conflicts were abuses of discretion must proceed case by case, applying principles of common sense to the totality of the circumstances, including the reason for the conflict, the length of the delay, the extent to which it could have been avoided by proper planning and allocation of judicial resources, the frequency, duration, and cause of any prior interruptions, and any evidence, available to the presiding court at the time it ordered the postponement, that the delay would work against the defendant's litigation interests. (*See, e.g.*, *People v. Ruiz, 44 Cal. 3d 589, 617 (1988)* [conduct of capital trial on schedule of three and one-half days per week was justified …]; *Rhinehart v. Municipal Court, 35 Cal. 3d 772, 783 (1984)* [six-day delay in commencement of trial was not justified on grounds assigned judge was on vacation …]; *People v. Santa Maria, 229 Cal. App. 3d 269, 277 (1991)* [defendant's right to expeditious disposition was violated when trial court suspended capital jury deliberations for 11 days; record disclosed no exceptional circumstances …]; *People v. Gopal, 171 Cal. App. 3d 524, 545 (1985)* [exceptional circumstances justified 10-and-one-half-week hiatus in criminal trial where, after trial exceeded original two-month estimate, presiding judge was forced to resume administrative duties during unprecedented courtwide docket crisis which required his attention]; *People v. Engleman, 116 Cal. App. 3d. Supp. 14, 20–21 (1981)* [three-week trial recess between prosecution and defense cases was not justified where outside judge assigned to try case returned home to conduct other judicial business].)"

Generally speaking, **if there are too few judges to hear the examinations set, good cause does not exist** (*People v. Johnson, 26 Cal. 3d 557 (1980))* unless the problem is "attributable to exceptional circumstances (and does not) … merely arise out of chronic trial docket problems" (*Lewis v. Superior Court, 122 Cal. App. 3d 494 (1981)*; *Arreola v. Municipal Court, 139 Cal. App. 3d 108 (1983))*. In *People v. Sutton, 48 Cal. 4th 533, 538*

(2010), the Supreme Court distinguished *Johnson* and concluded that delaying trial "on a day-to-day basis for a brief period of time in order to permit … appointed counsel to complete an ongoing trial in another case that ran longer than had been anticipated [is] delay that—unlike the delay in *Johnson*—cannot fairly or reasonably be attributed to the fault or neglect of the state." In *People v. Hajjaj, 50 Cal. 4th 1184 (2010)*, the Supreme Court ruled that a defendant is not brought to trial within the statutory time frame when at 4:15 in the afternoon on the last day for trial a courtroom became available, since that courtroom was located 80 minutes away from the courtroom where the prosecutor, the defendant, and defense counsel were located (*Hajjaj, 50 Cal. 4th at 1191–1192, 1197)*. No good cause for the delay existed because the lack of an available courtroom stemmed from chronic congestion of the court's docket (*Hajjaj, 50 Cal. 4th at 1198–1199*), not from an exceptional circumstance (*Hajjaj, 50 Cal. 4th at 1200*).

In *People v. Engram, 50 Cal. 4th 1131, 1137–1138 (2010)*, the Supreme Court determined that the Superior Court did not violate the statutory preference for criminal trials contained in *Penal Code section 1050* by refusing to "assign criminal cases to the limited number of trial court departments reserved for specialized civil matters [like family law, probate and juvenile cases] or to the several judges from outside the county who had been assigned specifically to that court to assist in the trial of long-delayed civil matters."

NOTE:

Government Code section 68115 extends the time in which a hearing must be held to 15 days if necessary due to war, natural disaster, destruction of the courthouse, or "a large influx of criminal cases resulting from a large number of arrests within a short period of time threatens the orderly operation of a court … ." This extension must be authorized by the Chair of the Judicial Council.

If, on the last day on which the hearing can be held, either party uses an affidavit of prejudice against the only available magistrate, good cause exists for a one-day delay (*People v. Reed, 133 Cal. App. 3d Supp. 7 (1982)* (defense disqualification); *Bryant v. Superior Court, 186 Cal. App. 3d 483, 499–503 (1986)* (prosecution disqualification)).

A defendant's motion to disqualify the magistrate for cause tolls the time limit to hold the preliminary hearing for the time it takes to resolve that challenge. (*People v. Lind, 230 Cal. App. 4th 709 (2014))*.

1.1.19 What constitutes good cause: assigned counsel unavailable or unprepared.

Where delay is sought because the prosecutor or public defender assigned to the case is involved in another trial and the defendant objects, good cause does not exist absent exceptional circumstances (*Batey v. Superior Court, 71 Cal. App. 3d 952 (1977)* (prosecutor); *People v. Johnson, 26 Cal. 3d 557 (1980)* (public defender)). If, however, the unavailability of defense counsel at the preliminary examination leads to the violation of a time deadline and dismissal of the case, this dismissal does not count under *Penal Code § 1387*. (See discussion in Note 4.4.7.) Proposition 115 added § 987.05 to the Penal Code in an effort to reduce the unavailability of defense counsel at the examination. (See the discussion in Note 2.1.6.)

In 1987 and 1989, the Legislature amended section 859b, subdivision (b) to provide that "For purposes of this subdivision, 'good cause' includes, but is not limited to, those cases involving allegations that [sexual assault or child abuse] has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. Any continuance under this paragraph shall be limited to a maximum of three additional court days." The same legislation also amended section 1050, subdivision (g) in an identical fashion, except to provide that the continuance granted would be limited to 10 additional court days. In addition, in a series of amendments in 1997 through 1999, the Legislature expanded section 1050(g), but not section 859b(b), to add murder, stalking, and numerous other crimes to the listed offenses. The legislation also specified that, if the case being prosecuted is for stalking, only one 10-court day continuance may be granted. (*Burgos v. Superior Court, 206 Cal. App. 4th 817 (2012))*.

What should a magistrate do in a hypothetical situation where the prosecutor in a murder preliminary hearing moves under section 1050 for a three court day continuance so she may complete a preliminary hearing in a different murder prosecution and relies upon section 1050(g)? First, despite the language of that subdivision,

the prosecution is not entitled to an automatic continuance. Section 859b(b) is the more specific statute and, therefore, governs; it limits automatic determinations of good cause to sexual assault or child abuse cases. Second, because section 859b(b) recognizes that good cause *may* exist in other situations, the magistrate should have discretion to grant the continuance. In exercising that discretion, the magistrate should look to the following factors, among others: (1) when did the prosecution become aware that the other proceeding would not conclude before the current preliminary hearing was scheduled to begin; (2) did any unexpected events cause the delay; (3) what steps were taken to prepare a different prosecutor to handle this case; (4) why were those steps inadequate; and (5) if a different prosecutor is prepared to put on this preliminary hearing, are there any other reasons to delay the proceeding to permit the original prosecutor to appear, including but not limited to the impact on any victim or witness of substituting in a new prosecutor.

The unavailability of appointed defense counsel does not justify a continuance over the defendant's objection because it is not designed "to promote the best interests of his client …" (*Johnson, 26 Cal. 3d at 567*).

NOTE:

One exception to this rule exists. **When counsel requires a continuance to prepare his case, a reasonable delay beyond the statutory period should be granted even if the client objects** (*Eshaghian v. Municipal Court, 168 Cal. App. 3d 1070 (1985))*.

As *Eshaghian* demonstrates, this exception can swallow the *Johnson* rule. The assigned public defender in that case was unavailable because of a calendar conflict. Under *Johnson*, no continuance could be granted over the defendant's objection to permit that attorney to try the case at a later date. However, the court discharged the public defender, appointed new counsel, and granted his request for a continuance so he could prepare. Despite the defendant's objection, the appellate court approved this procedure. *See also* *People v. Kowalski, 196 Cal. App. 3d 174 (1987)* and *People v. Malone, 192 Cal. App. 3d 1096 (1987)* where the courts held that the defendants' constitutional rights to adequately prepared counsel prevailed over defendants' rights to a speedy preliminary hearing and justified delay of the hearing over defendants' objections.

When a defendant has elected self-representation, and then moves for appointment of counsel on the day of the preliminary examination, the court is entitled to condition approval of that request on the defendant's willingness to continue the hearing. Alternatively, the court can grant the request and then continue the hearing for good cause, to permit counsel to prepare, over the defendant's objection (*People v. Boulware, 20 Cal. App. 4th 1753 (1993))*.

1.1.20 What constitutes good cause: material witness unavailable.

Delay is often sought by a party to obtain a material witness. In this situation, the court should consider five factors when exercising its discretion:

(1) "That the movant has exercised due diligence in an attempt to secure the attendance of the witness at the trial by legal means; (2) that the expected testimony is material; (3) that it is not merely cumulative; (4) that it can be obtained within a reasonable time; and (5) that the facts to which the witness will testify cannot otherwise be proven." (*Owens v. Superior Court, 28 Cal. 3d 238, 251 (1980))*. The declaration accompanying the motion to continue under § 1050 should not be based on information and belief, but only on facts personally known to the declarant (*Brown v. Superior Court, 189 Cal. App. 3d 260, 265) (1987)*.

NOTE:

The prosecution is not entitled to a continuance for the convenience of their witnesses. *Pickett v. Municipal Court, 12 Cal. App. 3d 1158 (1970)* (school teachers on summer recess); *Baustert v. Superior Court, 129 Cal. App. 4th 1269, 1277 (2005)*; *Cunningham v. Municipal Court, 62 Cal. App. 3d 153 (1976)* (police officers on vacation). However, if a police officer is validly served with the subpoena and, because of vacation plans, fails to appear, a continuance is justified (*Gaines v. Municipal Court, 101 Cal. App. 3d 556 (1980)*; accord: *Mendez v. Superior Court, 162 Cal. App. 4th 827, 836 (2008)*). In

addition, when the prosecutor complies with *Penal Code section 1328, subdivision (c)* and delivers two copies of the subpoena to the officer's immediate superior or agent, the due diligence requirement has been satisfied, even if the officer never receives the subpoena. (*Jensen v. Superior Court, 160 Cal. App. 4th 266, 272–273 (2008)*. *Jensen* contains an excellent discussion of the due diligence requirement.

When a subpoenaed witness fails to appear at the preliminary hearing, the court may hear evidence and "if the court determines on the basis of the evidence that the witness is a material witness, the court shall issue a bench warrant for the arrest of the witness, and, upon the appearance of the witness, may commit him or her into custody until the conclusion of the preliminary hearing, or until the defendant enters a plea of nolo contendere, or the witness is otherwise legally discharged." (§ 881(b)). Note, also, that in considering a motion to continue, the magistrate should consider the **prior commitments** of all witnesses, including peace officers (§ 1050(g)).

In establishing good cause, the prosecution is entitled to rely on a mailed subpoena to establish effective service on an absent witness if *Penal Code § 1328d* has been complied with. That section provides that service is effective "when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, over the internet by email or by completion of the sender's online form, or in person, and identifies himself or herself by reference to his or her date of birth and his or her driver's license number or Department of Motor Vehicles identification card number. The sender shall make a written notation of the identifying information obtained during any acknowledgment by telephone or in person. The sender shall retain a copy of any acknowledgement received over the internet until the court date for which the subpoena was issued or until any further date as specified by the court." If a continuance is granted because a witness failed to appear pursuant to a properly acknowledged mailed subpoena, this section provides that "[s]uch a continuance shall only be granted for a period of time which would allow personal service of the subpoena and in no event longer than that allowed by law, including the requirements of §§ 861 and 1382."

In *People v. Shane, 115 Cal. App. 4th 196 (2004)*, in the context of upholding a trial court's decision to continue a misdemeanor trial beyond the 30 days provided for in section 1382, the court rejected the defendant's proposed rule that would require the prosecution to serve a subpoena on a police officer who is a material witness as soon as the trial date is set to show good cause for a continuance based on the officer's unavailability. In *Shane,* the officer was subpoenaed only four days before trial. "[B]ecause a finding of good cause is by its nature fact intensive, it would be entirely arbitrary for us to require as a matter of law that a witness's unavailability be determined no later than a fixed number of days before the trial date for good cause to be shown." (*Shane, at p. 205*).

1.1.21 What constitutes good cause: jointly charged defendants.

In *Sanchez v. Superior Court, 131 Cal. App. 3d 884 (1982)*, the Court of Appeal held that when one defendant obtains a continuance because of his attorney's calendar conflict, it is improper to order a continuance for an in-custody codefendant who objects. However, *see* *Greenberger v. Superior Court, 219 Cal. App. 3d 487, 501 (1990)* and *Hollis v. Superior Court, 165 Cal. App. 3d 642 (1985)*.

The *Sanchez* rule was overturned by Proposition 115. It added § 1050.1, which provides that if good cause exists to continue the arraignment, preliminary hearing, or trial of one defendant, then, on motion of the prosecution, it shall "constitute good cause to continue the remaining defendants' cases so as to maintain joinder." Section 1050.1 also provides: "The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time."

Note Article I, section 30(a), which was added to the California Constitution by Proposition 115. It provides that "[t]his Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature or by the people through the initiative process."

As discussed in Note 1.1.11, there is no good cause exception to the defendant's right to a preliminary examination within 60 days of the arraignment, plea, or reinstatement of criminal proceedings. Therefore, a request for a continuance by one jointly charged co-defendant, which justifies a delay in that defendant's examination, cannot be attributed to the other co-defendant pursuant to section 1050.1, and the magistrate may not set or continue the preliminary examination for the second co-defendant beyond the 60-day limit (*Ramos v. Superior Court, 146 Cal. App. 4th 719, 730–732 (2007))*. However, any dismissal resulting from application of this rule does not count under the two-dismissal rule of section 1387. (See section 1387 (c)(1), discussed in Note 4.4.4.)

In *In re Samano, 31 Cal. App. 4th 984, 991–993 (1995)*, the court held that the automatic O.R. provisions of § 859b do not apply to one jointly charged defendant when a second defendant has established good cause for a continuance of the preliminary examination. In effect, the right to deny O.R. release to one defendant extends to all when § 1050.1 applies. The court achieved this result, over a dissent, by interpreting the word "defendant" in the first exception to the O.R. release provisions in section 859b "to mean all jointly charged defendants" (*In re Samano, 31 Cal. App. 4th at 992–993*).

1.1.22 Delays resulting from defendant's mental status.

If a defendant seeks to exercise his right to represent himself under *Faretta v. California, 422 U.S. 806 (1975)*, and the court questions his mental capacity to do so, the time necessarily required in determining this capacity is to be excluded in computing the 10 court days (*Curry v. Superior Court, 75 Cal. App. 3d 221 (1977))*.

Note that if the court finds the defendant competent to stand trial pursuant to *Penal Code § 1368*, it is reversible error to find the defendant lacks the mental capacity for self-representation (*People v. Hightower, 41 Cal. App. 4th 1108 (1996))*.

In *People v. Roldan, 35 Cal. 4th 646, 670 (2005)*, our Supreme Court noted, "It is settled law, however, that the denial of a request for a continuance, when such a request is premised on an accused's persistent failure to cooperate with counsel and his deliberate refusal to assist counsel, is not arbitrary (***People v. Jenkins [(2000) 22 Cal. 4th 900,] 1037–1038***; *People v. Grant (1988) 45 Cal. 3d 829, 844 [248 Cal. Rptr. 444, 755 P.2d 894]*)."

1.1.23 Delays resulting from sheriff's failure to transport defendant.

In *Jackson v. Superior Court, 230 Cal. App. 3d 1391 (1991)*, the court found that the sheriff's failure to transport the defendant to court in a timely fashion did not justify a delay in his or her trial beyond the statutory period. *Jackson* was cited with approval in *People v. Hajjaj, 50 Cal. 4th 1184, 1202–1203 (2010)*. ***See also*** *People v. Hill, 37 Cal. 3d 491 (1984)* and *Blake v. Superior Court, 108 Cal. App. 3d 244 (1980)*. There is no reason to believe a different rule would apply to preliminary hearings. In *People v. Tucker, 196 Cal. App. 4th 1313 (2011)*, the court concluded the trial court did not abuse its discretion in determining good cause existed for delaying the defendant's trial because the defendant was in custody at a correctional facility under quarantine after another inmate contracted H1N1 flu, a dangerous, infectious disease.

1.1.24 Delay in filing the information.

Penal Code § 1382 provides that the information must be filed in the superior court no more than fifteen days after the holding order. A defendant who fails to assert this right in a timely fashion, however, waives it. *See People v. McGhee, 193 Cal. App. 3d 1333 (1987)* where the court held that the right was waived when the defendant first asserted it at the start of his trial, 14 months after the arraignment.

In *People v. Stiehl, 198 Cal. App. 4th 720 (2011)*, the District Attorneys' Office timely presented an information to the county clerk's office for filing. The clerk stamped the information "received," but not "filed," and placed it in the file for one of the defendant's other cases. The error was not discovered before the running of the 15-day period set out in § 1382, subdivision (a)(1). The court held that the information was filed when it was properly presented to the clerk's office, though the clerk mishandled it, and no speedy trial right was violated (at pp. 724–725).

1.1.25 Writ relief as prerequisite to dismissal.

Defendants seeking a dismissal for violations of the time guidelines of § 859b may, in some circumstances, be required to seek writ relief under § 871.6 first. For a discussion of this, *see* Note 1.3.3.

1.1.26 Effect of waiving speedy hearing on right to speedy trial under Interstate Agreement on Detainers.

Pursuant to the Interstate Agreement on Detainers (IAD) as set forth in *Penal Code § 1389*, a prisoner transferred from another state to California has a right to be tried within either 180 days (Article III) or 120 days (Article IV). A defendant's waiver of a speedy preliminary hearing constitutes a waiver of the speedy trial provisions of the IAD, even if the defendant is never informed of those speedy trial provisions or of this effect of the waiver (*Drescher v. Superior Court, 218 Cal. App. 3d 1140, 1148 (1990))*. Further, a defendant need not personally waive the right to be tried within the 180-day period. An attorney's consent to a specified delay is sufficient (*New York v. Hill, 528 U.S. 110, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000))*. In addition, there are two statutory exceptions permitting a trial beyond the 180-day period. Under Article VI, subdivision (a), "the running of [the] time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial … ." Article III, subdivision (a) also provides that "good cause shown in open court" constitutes a valid basis for extending the time limit. (*See People v. Posten, 108 Cal. App. 3d 633, 643 (1980)).* In *Netzley v. Superior Court, 160 Cal. App. 4th 348 (2008)*, the court concluded that the period of time the defendant had spent in an Oregon prison in disciplinary segregation as the result of his misconduct in prison rendered him "unable to stand trial" and, in turn, tolled the running of the 180-day statutory period.

1.1.27 Defendant's motion to continue the hearing.

Section 859b provides the prosecution as well as the defense with a right to a speedy preliminary examination, and the defendant must establish good cause under section 1050 to obtain a continuance. Section 1050, subdivision (g)(1) requires the court to consider the general convenience and prior commitments of all witnesses in deciding if good cause for a delay has been established.

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