

CALIFORNIA CRIMINAL PROCEDURE

By

LAURIE L. LEVENSON

Professor of Law and David W. Burcham Chair in
Ethical Advocacy,
Loyola Law School, Los Angeles

CONTINUING LEGAL EDUCATION



PROGRAMS AND PUBLICATIONS

THE RUTTER GROUP™

A DIVISION OF THOMSON REUTERS

For Customer Assistance Call 1-800-328-4880

© 2017 Thomson Reuters/The Rutter Group, 12/2017

Mat #41911452

© 2017 Thomson Reuters/The Rutter Group

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Permission is hereby granted for the copying of pages or portions of pages of this book by photocopy, Xerox or other similar process, or by manual transcription, by or under the direction of licensed attorneys for use in the practice of law. Otherwise, all rights reserved; no copying for in-house training distribution or other use is permitted that will infringe the copyright without the express written consent of The Rutter Group, a Division of West, a Thomson Reuters Business.

To contact us: Write to The Rutter Group at 15760 Ventura Blvd., Suite 630, Encino, CA 91436; or phone (818) 990-3260, tollfree (800) 747-3161; or fax (818) 986-2180; or visit our website, www.ruttergroup.com.

This book should be cited as Levenson, CALIFORNIA CRIMINAL PROCEDURE (The Rutter Group 2017).

DEDICATION

California Criminal Procedure is dedicated to the memory of Deputy City Attorney David Manella (1949–2004), a very special person whose commitment to ensuring justice will serve as an inspiration for all who knew him. His respect for the law made a difference in countless people’s lives and continues to inspire others to follow his example. David Manella not only knew the rules; he lived by them. The proud father of five, he was a great lawyer and an even better person. He will be missed.

ABOUT THE AUTHOR

Laurie Levenson is Professor of Criminal Law and Procedure, Ethics, and Evidence, and the David W. Burcham Chair in Ethical Advocacy at Loyola Law School in Los Angeles, California. Professor Levenson joined the Loyola faculty in 1989 and served as the Associate Dean for Academic Affairs from 1996–1999. Prior to joining Loyola, Professor Levenson was an Assistant U.S. Attorney, Criminal Division, Los Angeles, from 1981–1989. In that position she prosecuted major fraud, murder, public corruption, and narcotics cases. She also served as Chief of the Appellate and Training Sections for that office, and was an adjunct professor at Southwestern University School of Law from 1982–1989. She clerked for the Hon. James Hunter, U.S. Court of Appeals, Third Circuit, Los Angeles, from 1980–1981. Professor Levenson received her J.D. from the University of California at Los Angeles in 1980, where she was the Chief Article Editor for the UCLA Law Review. She received her undergraduate degree from Stanford University in 1977.

Professor Levenson is the author of numerous publications, including Thomson Reuters' Federal Criminal Rules Handbook (2017); Thomson Reuters California Criminal Law (with Ricciardulli); Thomson Reuters California Criminal Motions (with Ricciardulli); *Change of Venue and the Role of the Criminal Jury*, 66 So. Cal. L. Rev. 1533 (1993); *The Future of State and Federal Civil Rights Cases*, 41 UCLA L. Rev. 509 (1994); Thomson Reuters California Criminal Jury Instruction Companion Handbook (with Ricciardulli); and *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993).

She served as an officer of the Executive Committee of the Criminal Law Section of the State Bar of California, and was editor of the Criminal Law Section newsletter for five years. She has served on the Judicial Appointments Committee of the Los Angeles County Bar Association, and is a Special Master for the Los Angeles County Superior Court and the U.S. District Court for the Central District of California. Professor Levenson provided expert legal analysis to CBS, CNN, and NPR on high publicity criminal trials. She lectures extensively on criminal law and ethics in California and throughout the nation.

PREFACE

Nothing is simple in California, especially the law of criminal procedure. From Proposition 115 in 1990, to Proposition 36's changes to the "three-strikes" law in 2012, to Proposition 47 in 2014 and Propositions 57 and 66 in 2016, California law governing criminal procedure continues its dramatic changes. *Levenson on California Criminal Procedure* recognizes the challenges facing criminal practitioners and seeks to provide both the novice and experienced lawyer with a complete guide to California criminal procedure. This book analyzes each step of criminal cases, from pre-arrest to postconviction proceedings, directing the reader to all relevant code sections and case rulings. It also contains practical tips for applying the law. Overall, it is written to serve as an up-to-date handbook for those who practice criminal law in California's superior and appellate courts.

One of the greatest challenges in writing a treatise is to stay up to date. Yet, timeliness must be a priority. Each chapter of *Levenson on California Criminal Procedure* cites the most recent cases on issue, even occasionally referring to key cases not yet decided by courts. This edition is current through cases decided and legislation enacted before July 1, 2016. *Levenson on California Criminal Procedure* is updated annually.

Levenson on California Criminal Procedure is designed for the busy practitioner or judge who needs an answer *now* to both routine and tricky procedural issues. Thus, it contains an extensive and easy-to-use index, cross-references to all areas of the law that may impact on a decision, and research references to related West Group products such as Witkin. As a special feature, Comments and Warnings are included to alert the reader to the best approaches to procedural issues.

Working on *Levenson on California Criminal Procedure* has been a labor of love. There are many people to thank for its success. First, I owe an immense debt of gratitude to the many defense lawyers, prosecutors, judges, and probation officers who have contributed to its success. Their daily work in the criminal courts provided me with invaluable insights into the world of criminal practice. I am also extremely grateful to the editors at Thomson Reuters. Special thanks to the William M. Rains Foundation for its generous support, and to my many hard-working research assistants. Finally, thank you and much love to my husband, Doug Mirell, and chil-

CALIFORNIA CRIMINAL PROCEDURE

dren, Solly, Havi, and Daniela, for their endless support and encouragement.

LAURIE L. LEVENSON
September 2017

TIMELINE FOR FELONY TRIALS

<i>Event</i>	<i>Legal Requirement</i>	<i>Chap./Sec.</i>
ARREST STAGE		
Arrest	“Probable cause” or “reasonable cause required (Penal Code § 836)”	§ 3:2
	Felony—day or night (Penal Code § 840)	§ 3:31
Booking	Immediately after arrest (Penal Code § 7(21)), including <ul style="list-style-type: none"> ■ recording arrest ■ taking fingerprints and photographs 	§ 3:69
Certificate of Service	After arrest of defendant on warrant (Penal Code § 817(h)) <ul style="list-style-type: none"> ■ filed with issuing court 	§ 3:76
Bail	Amount set in warrant, at station, or at first appearance (Penal Code § 1269b) <ul style="list-style-type: none"> ■ bail exoneration at termination of proceedings or 2 years after date of initial bond unless exception (Penal Code § 1304) ■ bail forfeiture on failure to appear; 30 days’ notice required for surety (Penal Code § 1305) 	Ch. 4 § 4:29 § 4:31
INITIAL CHARGING AND APPEARANCES		
Complaint	Before first appearance and within statute of limitations, due process, and speedy trial requirements (Penal Code §§ 799-806)	§§ 11:26-11:30
Appearance Before Magistrate	Within 48 hours after arrest (excluding Sunday and holidays) (Penal Code § 825(a)) <ul style="list-style-type: none"> ■ defendant advised of rights ■ court reviews probable cause declaration ■ right to counsel (Penal Code § 858) 	§§ 3:73, 19:12 §§ 3:70-3:76 §§ 1:27-1:34
Motions for Competence Hearing	May be held prior to filing information, unless defendant’s counsel requests preliminary examination At latest, held prior to trial (criminal proceedings stayed) (Penal Code §§ 1368, 1368.1)	§§ 18:13-18:24

CALIFORNIA CRIMINAL PROCEDURE

<i>Event</i>	<i>Legal Requirement</i>	<i>Chap. / Sec.</i>
PROBABLE CAUSE DETERMINATION AND FORMAL CHARGING		
Preliminary Hearing	Within 10 days of arraignment or plea, whichever is later (Penal Code § 859b) <ul style="list-style-type: none"> ■ court determines whether probable cause to hold defendant for trial 	§§ 10:3 to 10:5, 19:14
Information	Within 15 days after defendant held to answer (Penal Code § 739; California Rules of Court, rule 4.110(1))	§§ 11:31, 13:2, 19:15
ALTERNATIVE PROCEDURE		
Grand Jury	Within 10 days of arraignment or plea, whichever is later (Penal Code § 917) <ul style="list-style-type: none"> ■ determine whether probable cause to hold defendant for trial ■ transcripts delivered to defendant's counsel within 10 days of indictment, unless good cause (Penal Code § 938.1) 	§§ 9:12, 9:13, 9:21, 9:22
Indictment	Within 10 days of arraignment or plea and within statute of limitations (Penal Code §§ 799-803) <ul style="list-style-type: none"> ■ alternative accusatory pleading for felonies 	§§ 11:32, 13:2
PRETRIAL PROCEEDINGS		
Arraignment	No statutory time (Penal Code §§ 988, 990; Cal. Rules of Court, rules 4.110, 4.100) <ul style="list-style-type: none"> ■ typically on date information or indictment filed, or immediately thereafter; defendant must have reasonable time to answer ■ trial date set ■ plea entered ■ appointment of counsel ■ bail motion 	§§ 13:1-13:8
Motion to Amend Pleading	Without leave of court at any time before defendant pleads or demurrer sustained (Penal Code § 1009) With leave of court at any stage of proceedings	
Motion to Sever or Join	At court's discretion (Penal Code §§ 954, 1098) as soon as possible	Chapter 12

TIMELINE FOR FELONY TRIALS

<i>Event</i>	<i>Legal Requirement</i>	<i>Chap. / Sec.</i>
Motion to Set Aside Indictment or Information	At arraignment or shortly after; no later than 60 days after defendant's arraignment if appellate review to be sought (Penal Code §§ 995(a), 1510)	§§ 11:39-11:50
Demurrer	At arraignment or within 7 days of initial arraignment, unless good cause (Penal Code §§ 1003, 1004; California Rules of Court, rule 4.110(3))	§§ 11:51-11:55
Discovery	Informal requests for discovery may be made immediately after arrest Mandatory discovery disclosures must be made at least 30 days prior to trial unless good cause shown	Chapter 16
PRETRIAL MOTIONS		
Motion to Disqualify Judge	For cause (Code of Civil Procedure § 170.3) when basis for disqualification discovered Peremptory challenge (Code of Civil Procedure § 170.6) within 10 days after all-purpose assignment or at least 5 days prior to hearing or trial date	§§ 18:3-18:7 § 18:8-18:11
Motion to Appoint Investigators and Experts	Anytime before or during trial (Evidence Code §§ 730, 731)	§§ 18:37-18:39
Motions to Suppress Evidence	Either at preliminary hearing or pretrial within 60 days of defendant's arraignment if defendant will seek appellate review (Penal Code §§ 1538.5(f), 1510) Motion may be filed at trial only if defendant unaware of grounds before trial (Penal Code § 1538(h))	§§ 6:8-6:12
Motion to Strike Prior Convictions	Anytime between entry of plea and court's judgment (<i>In re Cortez</i> (1971) 6 Cal.3d 78, 87) ■ ordinarily filed as pretrial motion	§§ 18:32-18:35
Motion re Destruction of Exculpatory Evidence	At discovery of destruction of evidence (<i>California v. Trombetta</i> (1984) 467 U.S. 479; <i>Arizona v. Youngblood</i> (1988) 488 U.S. 51)	§ 18:42
Motions re Pretrial Publicity	Anytime after arrest (<i>Sheppard v. Maxwell</i> (1966) 384 U.S. 333)	§§ 19:45-19:52
Motion to Sequester	Before voir dire (Penal Code § 1121)	§ 20:42

CALIFORNIA CRIMINAL PROCEDURE

<i>Event</i>	<i>Legal Requirement</i>	<i>Chap. / Sec.</i>
Motion to Change Venue	At least 10 days prior to trial (California Rules of Court, rule 4.151)	§§ 2:15-2:28
DIVERSION AND GUILTY PLEAS		
Diversion	Should request as early as possible (see, e.g., Penal Code §§ 1000-1000.5) <ul style="list-style-type: none"> ■ can be requested at any time prior to trial ■ requires pre-plea probation report 	Ch. 15
Guilty Plea	Anytime before judgment (Penal Code § 1016)	§§ 13:14-13:16
Motion to Withdraw Guilty Plea	Anytime before judgment, or within 6 months after order granting probation (Penal Code § 1018)	§§ 13:39-13:42
TRIAL		
Trial Date	Within 60 days of arraignment, unless good cause under Pen. Code, § 1050 (Penal Code § 1049.5) <ul style="list-style-type: none"> ■ defendant entitled to minimum of 5 days to prepare for trial 	§§ 13:49-13:54 § 19:16
Motion to Continue	At least 2 court days before hearing (see local rules; California Rules of Court, rule 4.113; Penal Code §§ 1048, 1049.5) <ul style="list-style-type: none"> ■ should file as soon as possible 	§§ 13:55-13:63
Subpoenas	Reasonable time to prepare and travel to hearing (Penal Code §§ 1328-1332; Code of Civil Procedure § 1987(a)) <ul style="list-style-type: none"> ■ recommended 10 days' notice ■ special rules for service on police officers, minors, and out-of-state witnesses 	§§ 21:1-21:6
Jury Waiver	Anytime before jury verdict (California Const., art. I, § 16)	§§ 19:33-19:36
Challenging Jury Panel	Before jurors sworn (Code of Civil Procedure § 225)	§ 20:22
In Limine Motions	Pretrial and during trial (Evidence Code § 402(b))	§ 23:31
Jury Instructions	Submit before argument (Penal Code § 1093.5)	§ 23:45
Motion for Judgment of Acquittal	After close of evidence of either side and before case submitted to jury (Penal Code §§ 1118, 1118.1)	§ 23:76
POSTTRIAL PROCEEDINGS		

TIMELINE FOR FELONY TRIALS

<i>Event</i>	<i>Legal Requirement</i>	<i>Chap. / Sec.</i>
Motion for New Trial	Prior to judgment (Penal Code § 1182)	§§ 28:7, 28:8
Motion to Modify Verdict	Prior to judgment (Penal Code § 1181)	§ 28:12
Motion in Arrest of Judgment	Prior to judgment (Penal Code § 1185)	§§ 28:13-28:15
Sentencing	Within 20 judicial days after verdict, finding, or guilty plea (Penal Code § 1191)	§ 25:4
Motion to Vacate Judgment (Petition for Coram Nobis)	After judgment <ul style="list-style-type: none"> ■ no statutory limitation 	§§ 28:17-28:19
Motion to Expunge Record	After completion of probation (Penal Code § 1203.4) <ul style="list-style-type: none"> ■ 15 days' notice to prosecution 	§ 28:24
Governor's Pardon	During period of sentence (Penal Code § 4804) <ul style="list-style-type: none"> ■ 10 days' notice to prosecution 	§ 28:27
APPEALS		
Bail Pending Appeal	After conviction (Penal Code §§ 1272-1275)	§ 29:34
Filing Notice of Appeal	Notice (California Rules of Court, rule 8.308(a)) <ul style="list-style-type: none"> ■ within 60 days after judgment or making of order ■ automatic in death penalty cases 	§ 29:25
Certiorari Petition: California Supreme Court (Writ of Review)	10 days after Court of Appeal decision final (California Rules of Court, rule 8.500(a))	§ 30:33
HABEAS CORPUS		
Habeas Corpus	May be filed concurrently with direct appeal or after appellate remedies exhausted (Penal Code § 1473) <ul style="list-style-type: none"> ■ special rules for death penalty cases 	§§ 30:16-30:18 §§ 26:32-26:36

Key California Criminal Motions

Chapter 18 reviews in detail pretrial motions. A table of other motions covered by this book can be found at § 18:2. This table refers to motions commonly called by the case names from which they are derived.

<i>Motion</i>	<i>Description</i>	<i>Chap./Sec.</i>
Apprendi	Motion to require jury findings as to any enhancement (other than prior convictions) or to prove an element of a crime.	§ 19:30, § 25:49, § 25:51
Aranda/Bruton	Motion to bar prosecution's introduction of codefendant's statement in joint trial on confrontation grounds, or to sever trials.	§ 7:35, § § 12:11-14, § 12:24
Arbuckle	Motion to be sentenced by same judge who accepted guilty plea.	§ 25:4
Batson/Wheeler	Motion challenge discriminatory use of peremptory challenge	§ 20:28
Brady	Motion for disclosure of exculpatory information.	§ 16:1, § 16:4, § 16:6, § 16:26
Castro	Motion for judge to use discretion under Evidence Code § 352 in deciding whether to admit or exclude prior convictions to impeach witness credibility.	§ 18:41
Dillon	Motion to reduce sentence as being cruel and unusual punishment	§ 25:81
Evans	Motion for a pretrial lineup	§ 8:6
Faretta	Motion for self-representation	§ § 1:38-45
Franks	Motion to suppress evidence seized under search warrant with misrepresentations	§ 5:31
Green-Thompson	Motion to find felony-murder special circumstance to be inapplicable because defendant intended to commit the murder and specified felonies were only committed incidentally.	§ 26:2
Griffin	Motion challenging prosecution's reference in closing argument to defendant's failure to testify	§ 23:41, § 23:45
Harvey-Madden	Motion to require prosecution to show source of information for probable cause	§ 5:29
Kellett	Motion to dismiss or preclude punishment based on double jeopardy principles and/or Penal Code § 654	§ 12:7

CALIFORNIA CRIMINAL PROCEDURE

<i>Motion</i>	<i>Description</i>	<i>Chap./Sec.</i>
Kelly	Motion to determine admissibility of expert scientific evidence	§ 22:12
Lent	Motion to challenge conditions of probation	§ 25:24
Marsden	Motion to appoint different counsel	§ 1:37
McNabb-Mallory	Motion to suppress evidence based upon a violation of defendant's right to a speedy arraignment	§ 3:73
Mejia	Motion to dismiss or suppress evidence because of deportation of a material witness	§ 21:13
Murgia	Motion to dismiss for discriminatory prosecution	§ 11:50
Pitchess	Motion for disclosure of police officer's personnel file	§ 16:26
Serna	Motion to dismiss for speedy trial violation in pre-arraignment post-charging period	§ 16:9
Trombetta	Motion to dismiss for prosecution's bad faith destruction of exonerating evidence	§ 18:42
Wade-Gilbert	Motion to suppress post-indictment line-up identification for failure to provide counsel	§ 8:19

For more information regarding California Criminal Motions, see *Levenson & Ricciardulli, California Criminal Motions* (Thomson Reuters/The Rutter Group (2016)).