

Chapter 1

The Clock

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I. TIME WAIVERS

§ 1:1 Defendant’s agreement to waive time

Generally, after a defendant is arraigned, the next event

is the preliminary hearing. Because of statutory time constraints, commonly referred to as the 10/60 day rule, the parties often seek to continue the preliminary hearing. There are several ways to continue a preliminary hearing. The most common way involves the defendant's agreement to "waive time."

§ 1:2 Penal Code § 859b

Penal Code § 859b provides a statutory right to a speedy preliminary hearing. It is the genesis of the 10/60 day rule. The relevant portions state:

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 Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, shall set a time for the examination of the case . . ."

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 Section 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 Section 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 . . . , and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur:

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

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

. . .

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 . . . , unless the defendant personally waives his or her right to a preliminary examination within the 60 days.

Penal Code section 859b is reproduced in its entirety in Appendix A.

§ 1:3 General time waivers

Once a general waiver of the 10/60 clock is taken, the time

limits are waived and cannot be reclaimed unless there is a triggering event¹ that provides a new clock. Re-waivers are not required. (*People v. Love*, 132 Cal. App. 4th 276, 285-286, 34 Cal. Rptr. 3d 6 (1st Dist. 2005).) [See discussion of Once Taken, Time Waivers Are Likely Irrevocable, in § 1:5]

Once a general time waiver has been taken, the constitutional right to a speedy trial safeguards against undue and oppressive delays.²

§ 1:4 Limited time waivers

A defendant may enter a limited time waiver of his or her

[Section 1:3]

¹Common triggering events are: reinstatement of criminal proceedings once a defendant regains competency (*Davis v. Superior Court*, 18 Cal. App. 5th 1061, 1066-1067, 227 Cal. Rptr. 3d 367 (1st Dist. 2017)); arraignment on an amended complaint (*Garcia v. Superior Court of Los Angeles County*, 47 Cal. App. 5th 631, 647-648, 261 Cal. Rptr. 3d 161 (2d Dist. 2020), review denied, (July 29, 2020)); and, likely, re-arraignment after a bench warrant pick-up.

²Both the state and federal constitutions protect a defendant's right to a speedy trial. But the federal and state analyses to determine whether post-accusation delay violates a defendant's speedy trial right are different. In a felony case, under the state constitution, the right to a speedy trial attaches upon arrest or upon the filing of a felony complaint, whichever comes first. (*People v. Mirenda*, 174 Cal. App. 4th 1313, 1327, 95 Cal. Rptr. 3d 702 (4th Dist. 2009).) For an arrest to begin the clock, the defendant must either be held in custody or subject to restrictions, such as being placed on bond. (*People v. Martinez*, 22 Cal. 4th 750, 762, 94 Cal. Rptr. 2d 381, 996 P.2d 32 (2000); *People v. Williams*, 207 Cal. App. 4th Supp. 1, 7, 144 Cal. Rptr. 3d 360 (App. Dep't Super. Ct. 2012).) The defendant bears the initial burden to establish actual prejudice. There is no presumption of prejudice. However, any showing of prejudice, no matter how slight, will be sufficient to shift the burden to the government to justify the delay. (*People v. Lowe*, 40 Cal. 4th 937, 942, 56 Cal. Rptr. 3d 209, 154 P.3d 358 (2007); *Scherling v. Superior Court*, 22 Cal. 3d 493, 505, 149 Cal. Rptr. 597, 585 P.2d 219 (1978).) Under the federal constitution, the right attaches either upon the filing of an indictment or information or an arrest with continuing restraint; the filing of a felony complaint is by itself insufficient to trigger the Sixth Amendment speedy trial right. (*People v. Martinez, supra*, 22 Cal.4th 750, 754-755.) Accordingly, a defendant cannot challenge the delay between the filing of the felony complaint and the magistrate's holding order, unless the defendant is in custody or on bail with continuing restraints. (*People v. Horning*, 34 Cal. 4th 871, 891, 22 Cal. Rptr. 3d 305, 102 P.3d 228 (2004).) "The reason is that the Sixth Amendment requires formal accusation in the court with jurisdiction over the prosecution of the charge, or arrest with continuing restraint on such charge." (*People v. DePriest*, 42 Cal. 4th 1, 26, 63 Cal. Rptr. 3d 896, 163 P.3d 896 (2007), as modified, (Oct. 24, 2007) (internal quotes and citations omitted).) Once the right attaches under the federal constitution, whether the delay violates the federal constitution depends upon the result of the four-factor balancing test as discussed in *Barker v. Wingo*, 407 U.S. 514, 530-533, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

rights under Penal Code § 859b by agreeing to continue the preliminary hearing to a specific date beyond the 60-day limit. (See *Garcia v. Superior Court of Los Angeles County*, 47 Cal. App. 5th 631, 651-652, 261 Cal. Rptr. 3d 161 (2d Dist. 2020), review denied, (July 29, 2020) [where the defendant waived time and the court set a new date as the “0 of 30,” the waiver was not an “unqualified” waiver and was instead “expressly conditioned upon the preliminary hearing being held within 30 calendar days of [that date]”]; *People v. Superior Court of Los Angeles County*, 59 Cal. App. 5th 923, 938-939, 273 Cal. Rptr. 3d 777 (2d Dist. 2021), review denied, (Apr. 14, 2021) [“section 859, subdivision (b), allows both general and limited time waivers, thereby preserving a defendant’s right to demand the preliminary hearing take place within 60 days of arraignment or plea, or an agreed-upon date certain”]; *Favor v. Superior Court of San Bernardino County*, 59 Cal. App. 5th 984, 990, 273 Cal. Rptr. 3d 824 (4th Dist. 2021), review denied, (Apr. 14, 2021) [defendant entered limited waiver when he agreed that preliminary hearing “could occur within 60 days of March 6” (internal quotes omitted)].)

When a defendant enters a limited time waiver, the date to which the defendant agrees is “the last day on which the preliminary hearing [can] be held based on [the defendant’s] limited waiver.” (*Garcia, supra*, 47 Cal.App.5th at p. 652.) If the preliminary hearing does not occur by that date, the court must dismiss the complaint. (*Favor, supra*, 59 Cal.App.5th at p. 992.) When a defendant conditionally waives his or her rights under § 859b and agrees to the next date as a preliminary hearing setting date, for example, a “0 of 30,” with the 30th day being a new last day (well beyond the initial statutory 60th day), the defendant is entering into a limited time waiver. If the limited time waiver is breached, i.e., the preliminary hearing does not take place by the new last day, § 859b requires dismissal.³ (See discussion of Motions to Dismiss for Violations of the 10/60 Day Rules at §§ 1:29 et seq.)

[Section 1:4]

³Courts have described the nature of the breach of a limited time waiver differently. In one sense, the new last day identified by limited time waiver effectively becomes a new “60th day,” extending and preserving § 859b’s dismissal remedy if the preliminary hearing does not go forward by the new last day. (*Favor, supra*, 59 Cal.App.5th at p. 990 [“In our view, a defendant may personally waive the 60-day rule in a limited manner, extending the deadline to a particular date beyond the original deadline, but not waiving it altogether.”]) Alternatively, because the specific condition that formed the basis for the time waiver was not met, the waiver is not valid or enforceable, and § 859b requires dismissal because the preliminary hearing was continued beyond the 60th day

§ 1:5 Once taken, time waivers are likely irrevocable

In *People v. Love*, 132 Cal. App. 4th 276, 34 Cal. Rptr. 3d 6 (1st Dist. 2005), an out-of-custody defendant waived her right to have a preliminary hearing within 10 court days and 60 calendar days of her plea. (*Id.* at p. 280.) She then failed to appear for a setting conference and was arrested on a bench warrant. (*Id.* at p. 281.) The defendant eventually appeared in custody five months after her initial plea, and her preliminary hearing was held 15 days later. The defendant argued she was entitled to a dismissal under § 859b because her preliminary hearing was not conducted within 10 court days of her reappearance in custody. The trial court agreed and dismissed the complaint. (*Love, supra*, 132 Cal.App.4th at 282.) The Court of Appeal reversed, noting that while § 1382 expressly provides for withdrawal of a time waiver and specifies that a defendant must be brought to trial within 60 days of the withdrawal, § 859b lacks a similar provision providing for the withdrawal of properly entered waivers. (*Id.* at pp. 285-286.) Finding that section 859b does not contain a mechanism to withdraw a waiver, the court stated: “The Legislature has not inserted similar provisions in section 859b. Defendant asks that we “recogniz[e] the requirement of a new personal waiver under 859b for defendants who come into custody on a bench warrant, having previously waived time while out of custody.” The Legislature may choose to articulate the rule defendant seeks. It is not for us to enact such a provision in their stead. “It is an elementary principle that the judicial function is simply to ascertain and declare what is in the terms and substance of a statute, not to insert what has been omitted or omit what has been inserted.” (*Id.* at p. 286 (internal citations omitted).)

Without a statutory basis to withdraw a general time waiver, such a waiver is likely irrevocable.⁴ (Accord *People v. Klaut*, 2011 WL 287890, *5 (Cal. App. 1st Dist. 2011), unpublished/noncitable, (Jan. 31, 2011) and as modified on denial of reh’g, (Feb. 18, 2011) [defendant’s open-ended time waiver without setting a new date for the preliminary hearing is irrevocable].)

without a valid personal waiver from the defendant. (*Garcia, supra*, 47 Cal.App.5th at p. 652; *Arnold, supra*, 59 Cal.App.5th 923, 938-939.) Either way, the failure to hold the preliminary hearing by the new last day requires dismissal of the complaint.

[Section 1:5]

⁴For the same reasons, a limited time waiver is likely irrevocable as well.

§ 1:6 Penal Code § 1368 and competency

The 10/60-day clock begins anew once the defendant is found competent even if the defendant waived previously. (See *Davis v. Superior Court*, 18 Cal. App. 5th 1061, 1066, 227 Cal. Rptr. 3d 367 (1st Dist. 2017) [“The words and structure of the statute lead us to conclude that, if criminal proceedings are suspended, the relevant personal time waiver is one made *after* criminal proceedings are reinstated” (emphasis in original)].)

In *People v. Figueroa*, 11 Cal. App. 5th 665, 218 Cal. Rptr. 3d 104 (6th Dist. 2017), the court held that the latter of the operative triggering events (arraignment, plea, or reinstatement) starts the clock. In an unusual set of facts, the defendant was initially arraigned but postponed entering a plea. He was then found incompetent. Once he regained competency, criminal proceedings were reinstated, and the court took a 60-day waiver, not a 10-day waiver and not a plea. (*Figueroa, supra*, 11 Cal.App.5th at 671.) At a subsequent proceeding, the defendant finally entered a plea and the court took a 10-day waiver. The Court of Appeal held the last of the triggering events started the clock, i.e., when the defendant entered his plea. Because the defendant did not waive the 60-day clock at the time he entered his plea and the preliminary hearing took place beyond the 60-day period, the complaint was ordered dismissed. (*Figueroa, supra*, 11 Cal.App.5th at 684.) Notably, the appellate court also held that the 60-day waiver, taken prior to the operative triggering event (the plea), did not act as a *prospective* waiver. (*Figueroa, supra*, 11 Cal.App.5th at 685.)

§ 1:7 Absent § 859b violation, no dismissal within 60 day period

If the defendant waives the 10-day clock (or is out of custody) but retains his or her 60-day rights, even where the People lack good cause to continue, if the matter is within the 60-day period, the court cannot dismiss the complaint. (*People v. Henderson*, 115 Cal. App. 4th 922, 931, 9 Cal. Rptr. 3d 655 (4th Dist. 2004) [“Once the defendant waives the 10-day period, no additional waiver is required so long as the court schedules the preliminary hearing within 60 calendar days.”].) Where the defendant waived the 10-day clock and the People moved to continue to a date within the 60-day period, but lacked good cause for the continuance, the *Henderson* Court held that the trial court erred by dismissing the case because (1) the continuance still fell within