

IMPLEMENTATION OF KELLETT'S COMMAND: JOINDER OF MISDEMEANORS AND FELONIES IN SUPERIOR COURT

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INTRODUCTION

In 1966, the California Supreme Court rendered its decision in *Kellett v. Superior Court*.¹ This decision had a dramatic effect upon the pleading practices of prosecutions in California; it defined how and when a defendant should be charged with a misdemeanor when the defendant is charged also with a felony which was committed at the same time as the misdemeanor. *Kellett's* affect on the criminal pleading practice resulted from the court's harmonizing of certain sections of the California Penal Code.

Though few prosecutors, defense attorneys and trial judges were excited by the result reached in *Kellett*, many were startled by the interpretation which the court gave to the relevant sections, and with the direction that misdemeanors—in any type of case or under any circumstances—be joined as separate counts with felony charges in the superior court.

Several years have passed since the *Kellett* decision was rendered. Nevertheless, it has been this writer's experience that both real and hypothetical questions are still presented from the prosecution's attempt to follow the teachings of this case. It will be the purpose of this article to analyze and explore the theory and practice of joining misdemeanors with felonies in complaints before magistrates, in informations, and in indictments.

PART I. KELLETT V. SUPERIOR COURT

A. The Decision

Arriving in answer to a reported disturbance, the police observed the defendant standing on a public sidewalk with a pistol

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1. 63 Cal. 2d 822, 409 P.2d 206 48 Cal. Rptr. 366 (1966).

in his hand and arrested him. The same day he was charged with a violation of section 417² (exhibiting a firearm in a threatening manner), a misdemeanor offense. Approximately a month later, while his misdemeanor charge was pending in municipal court, and apparently after a felony complaint had been filed, a preliminary hearing was conducted, wherein it appeared that the defendant had a prior felony conviction. As a consequence, he was ordered by the magistrate to appear in superior court to answer an information which was filed charging him with a violation of section 12021³ (possession of a concealable weapon by a person who has been convicted of a felony), a felony offense. While he was awaiting trial on his felony charge in superior court, the defendant pled guilty in municipal court to a charge of exhibiting a firearm in a threatening manner, and was sentenced to 90 days in the county jail. Six days after his misdemeanor conviction and sentence, the defendant appeared in superior court and moved to dismiss his pending felony charge on the ground that it was barred by section 654.⁴ The California Supreme Court, in a unanimous opinion, upheld the defendant's contention, observing:

By a series of amendments to section 954 that have greatly expanded the scope of permissible joinder, the legislature has demonstrated its purpose to *require* joinder of related offenses in a single prosecution.

. . . .

If needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively. When there is a course of conduct involving several physical acts, the actor's intent or objective and the number of victims involved, which are crucial in determining the permissible punishment, may be immaterial when successive prosecutions are attempted.

When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of

2. CAL. PENAL CODE § 417 (West 1955).
3. CAL. PENAL CODE § 12021 (West 1956).
4. CAL. PENAL CODE § 654 (West 1955). This section states in part:
An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

conduct plays a significant part, all such offenses *must* be prosecuted in a single proceeding *unless* joinder is prohibited or severance permitted *for good cause*. Failure to unite all such offenses will result in a *bar* to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.⁵

B. Analysis

The law prior to *Kellett* was generally understood to prohibit joining a misdemeanor charge as a separate count in an indictment that alleged a felony charge and was filed in superior court. This was the position of *People b. Rodriguez*,⁶ which concluded that if both misdemeanor and felony charges were to be prosecuted, it may only be accomplished by successive trials, the misdemeanor in municipal court, the felony in superior court. This decision was reached despite the contrary holding of an earlier case, *People v. Bundte*.⁷ *Bundte* stated that misdemeanors and felonies could be united, provided they grew out of the same transaction, or series of transactions which were corollary in nature. Now, *Kellett* teaches that the joinder of a misdemeanor and a felony charge in a single accusatory pleading is permissible within section 954.⁸

But *Kellett* teaches more. It not only permits the joinder of related misdemeanor and felony offenses in a single superior court pleading, it *requires* such a joinder. Thus, when facts are present to indicate that a misdemeanor was committed during the same act or omission as a felony, the district attorney *must* join the misdemeanor with the felony if he wishes to prosecute the misdemeanor. Otherwise, under *Kellett*, the government would be

5. 63 Cal. 2d at 826-27, 409 P.2d at 208-10, 48 Cal. Rptr. at 369-70 (emphasis added).

6. 202 Cal. App. 2d 191, 20 Cal. Rptr. 556 (1962). See also *In re Williamson*, 43 Cal. 2d 651, 276 P.2d 593 (1954) (conspiracy to do an act prohibited by law, but not a felony, is a misdemeanor over which a superior court has no jurisdiction), and *People v. Ayala*, 167 Cal. App. 2d 49, 334 P.2d 61 (1959).

7. 87 Cal. App. 2d 735, 196 P.2d 823 (1948).

8. CAL. PENAL CODE § 954 (West 1956) reads in part:

An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crime or offenses, under separate counts.

barred from prosecuting the defendant for either offense if an acquittal or conviction and sentence had already been rendered on the other charge.

The Chief Justice, writing for a unanimous court, originally drafted the third footnote to the *Kellett* opinion to read:

Section 954 does not distinguish felonies and misdemeanors in its provisions for joinder. Thus, unless an inferior court is given exclusive jurisdiction of a misdemeanor, it may be joined with a felony in one prosecution in the superior court. (*People v. Bundte*, 87 Cal. App.2d 735, 744 [197 P.2d 823].) To the extent that it is inconsistent with this opinion, *People v. Rodriguez*, 202 Cal. App. 2d 191 [20 Cal. Rptr. 556], is disapproved.⁹

As originally written, the second sentence of the footnote could mean either, (a) that *Kellett* interprets section 954 to permit a misdemeanor to be joined with a felony in a superior court prosecution unless an inferior court has been given exclusive jurisdiction of the misdemeanor by virtue of the filing of a misdemeanor complaint in an inferior court, or (b) that *Kellett* interprets section 954 to permit a misdemeanor to be joined with a felony and prosecuted in the superior court unless an inferior court has been given exclusive jurisdiction over the misdemeanor by the legislature.

In order to remove any ambiguity from the original footnote, the court subsequently modified the second sentence of footnote three to read: "It [section 954] therefore authorized the joinder of a misdemeanor and a felony count in a prosecution in the superior court."¹⁰ In other words, *Kellett* interprets section 954 to permit a misdemeanor to be joined with a felony in a superior court prosecution unless the misdemeanor is separately prosecuted by the filing of a misdemeanor complaint in an inferior court.¹¹ Any

9. 63 Cal. 2d at 826, 409 P.2d at 209, 48 Cal. Rptr. at 369.

10. *Id.*

11. That such is the rule is shown by the court's approval of the sweeping language of *Bundte* and disapproval of *Rodriguez* in *Kellett*. Even assuming that footnote 3 to the *Kellett* opinion does *not* remove the argument set forth above (i.e., that *Kellett* interprets section 954 to permit a misdemeanor to be joined with a felony and prosecuted in the superior court unless an inferior court has been given exclusive jurisdiction over the misdemeanor by the legislature) this argument or interpretation has no application to misdemeanors under the general law. Thus municipal courts under CAL. PENAL CODE § 1462 (West 1956), and justice courts under CAL. PENAL CODE § 1425 (West 1956) have

argument to limit the supreme court's teachings in *Kellett* to misdemeanors which because of their penalties, are within the jurisdiction of the superior court, as was the situation in the *Bundte* case, is of no avail; on its facts, the misdemeanor in *Kellett* was not within the jurisdiction of the superior court because of its penalty.

PART II. APPLICATION OF KELLETT'S COMMAND

A. *The Speedy Trial Provisions of Section 1382*¹²

Kellett interpreted the legislature's intent to permit the joinder of misdemeanors and felonies under section 954, and interpreted section 654 to require such a joinder of cases within its purview. It would follow that the California Supreme Court and the legislature intended to interpret the constitutional right to a speedy trial as requiring the trial of a misdemeanor joined with a felony within 60 days of the filing of an information or finding of an indictment. If a misdemeanor-felony charge were required to be tried within 30 days of the filing of a complaint, or within 45 days of a defendant's release on bail, it would defeat *Kellett's* command of joinder. Such an interpretation would require a practical impossibility.

The California Supreme Court and the legislature are knowledgeable of the normal procedures, proceedings and time involved in getting a case to trial—within the time permitted for a speedy trial. They are aware that, in a superior court criminal case instituted by the filing of an information, it normally proceeds from the filing of the complaint, arraignment by the

exclusive criminal jurisdiction only as to violations of ordinances in cities or towns situated within the district in which these inferior courts are established. The legislature has not given the inferior courts exclusive criminal jurisdiction over misdemeanors under the general law or under county ordinances.

12. CAL. PENAL CODE § 1382 (West 1956) reads, in pertinent part, as follows:

The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:

1. When a person has been held to answer for a public offense and an information is not filed against him within 15 days thereafter.

2. When a defendant is not brought to trial in a superior court within 60 days after the filing of the indictment, or filing of the information

3. Regardless of when the complaint is filed, when a defendant in a misdemeanor case in an inferior court is not brought to trial within 30 days after he is arraigned . . . or if he has been released on bail or on his own recognizance, in which case within 45 days after such release.

magistrate the next day and a preliminary hearing in 10 to 15 days. Then there is a bind over, the filing of an information in about 14 days, an arraignment on the information in about 14 days, an arraignment on the information in the superior court a few days later, and a trial on the offenses alleged in the information within 60 days of its filing. In other words, to avoid a dismissal, if a misdemeanor joined with a felony in an information filed in the superior court were to be tried under the time limits in subdivision 3 of section 1382 (30 days) the superior court would virtually have to call the case for trial on the date a defendant is arraigned in the superior court—if it were not already too late.

A close reading of section 1382 precludes such an interpretation. It is to be noted that subdivision 1 of that Section reads “When a person has been held to answer for a *public offense*”¹³ Significantly, the legislature did not use the word “felony”. A misdemeanor is a public offense. Thus, the legislature used a broader term than it could have if it intended to designate a type of public offense.

Since sections 954 and 654 have been interpreted as permitting and requiring the joinder of misdemeanors and felonies in the superior court, section 1382 must be interpreted as having been intended to apply subdivisions 1 and 2 to the interpretation of “speedy trial” in cases where misdemeanors and felonies are properly joined. In other words, section 1382 must be interpreted “in the spirit” of the *Kellett* decision.

Should the prosecution simply not have alleged the misdemeanor in the original complaint, and then allege it in the information? If so, what is accomplished? If anything is accomplished it is a possible disadvantage to a defendant.

Is it not preferable for the prosecution to give a defendant notice at the earliest opportunity that he will be held to answer for the commission of a misdemeanor—so his counsel can conduct his defense accordingly during the preliminary examination? What if the prosecution did not allege the misdemeanor in the complaint? The defendant may object to certain evidence being introduced before the magistrate, which

13. *Id.* § 1382(1).

might be relevant to the misdemeanor, but irrelevant to the felony alleged in the complaint. By failing to include the misdemeanor in the complaint, but alleging it in the information, the government would be subjecting itself to a motion under section 995¹⁴ to set aside the misdemeanor because of the insufficiency of the evidence at the preliminary hearing.

The relevant statutory provisions should be read in a manner which would not require procedural impossibilities. The supreme court by its decision in *Kellett* was not creating a procedural trap. Since an arraignment before a magistrate on a complaint does not invoke any trial jurisdiction, the speed of the trial, where misdemeanors are joined with felonies, is governed by subdivisions 1 and 2 of section 1382; subdivision 3 of section 1382 is inapplicable.

B. Grand Jury and Misdemeanors

It is clear from *Kellett*, when within the purview of section 654, that misdemeanors and felonies may be joined and prosecuted in the superior court by an information. However, can a grand jury return an indictment which joins misdemeanors and felonies which meets the test of the multiple prosecution prohibition? On analysis of the relevant sections, when read in the spirit of *Kellett*, it appears that there is authority for this.

Kellett holds that the superior court itself has jurisdiction over a misdemeanor which is joined with a felony. But is there any bar to the grand jury inquiring into misdemeanor offenses? Section 917¹⁵ presents none, stating that the grand jury may inquire into "public offenses." Its inquiry is not limited to felonies. "Public offense" is a broad term which includes both felonies and misdemeanors.¹⁶ Further, section 917 states that the

14. CAL. PENAL CODE § 995 (West 1956).

15. CAL. PENAL CODE § 917 (West 1956) which reads: "The grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment."

16. CAL. PENAL CODE §§ 15, 16 (West 1956). The legislative authority for the grand jury to inquire into all public offense (felonies and misdemeanors) is consistent with the authority and duty which it gave to magistrates conducting preliminary examinations. CAL. PENAL CODE § 872 (West 1956) requires the magistrate to commit a defendant for trial if there is sufficient evidence "that a *public offense* has been committed." (emphasis added). And if the magistrate is satisfied that a public offense has been committed and that there is sufficient cause to believe the defendant is guilty thereof, CAL. PENAL CODE

grand jury may *present* all public offenses, (felonies and misdemeanors) to the court by an indictment. Therefore, there not only appears to be authority for the grand jury to inquire into misdemeanor offenses,¹⁷ but also authority for misdemeanors to be charged in an indictment.

C. Grand Jury Procedure When Only a Misdemeanor Is Found

Since felonies and misdemeanors, which are within section 654, may be presented to a superior court by an indictment, what should be done when the grand jury finds only a misdemeanor? Should the grand jury present an indictment charging the misdemeanor alone to a municipal or justice court or must a complaint be filed?

Under *Kellett*, a superior court has jurisdiction over misdemeanor offenses when they are joined with felony offenses alleged in an information or indictment. If no felony offense is alleged, it would appear that sections 1425¹⁸ and 1462¹⁹ would place the jurisdiction of the misdemeanor offenses in the inferior courts.

Section 917 provides that the grand jury is to present its charges by indictment. There is no specific statutory authority for the grand jury to return or present a complaint. Section 682²⁰

§ 872 (West 1956) provides that the magistrate "must make . . . an order [committing the defendant]." (emphasis added). A magistrate cannot discharge a defendant unless, "after hearing the proofs, it appears either that *no public offense* has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense" CAL. PENAL CODE § 871 (West 1956) (emphasis added).

17. A more recent indication that the legislature expressly made misdemeanors cognizable by grand jury is shown in CAL. PENAL CODE § 496(1) (West Supp. 1968).

Every person who buys or receives any property which has been stolen or has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, withholds or aids in concealing or withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison for not more than 10 years, or in a county jail for not more than one year; provided, that where the district attorney or the grand jury determines that such action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed two hundred dollars (\$200), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in the county jail not exceeding one year.

18. CAL. PENAL CODE § 1425 (West 1956).

19. CAL. PENAL CODE § 1462 (West 1956).

20. CAL. PENAL CODE § 682 (West 1956) provides:

Every public offense must be prosecuted by indictment or information except:

1. Where proceedings are had for the removal of civil officers of the state;

provides, with certain exceptions, that all public offenses must be prosecuted by indictment or information; one exception is regarding public offenses tried in inferior courts. At this point section 740²¹ comes into play.

It could be argued that a grand jury finding only a misdemeanor could present such public offense to the inferior court by indictment under the authority of section 917. This pleading would be within the language of section 740, which requires that a prosecution in inferior courts be initiated by complaints "[e]xcept as otherwise provided by law." Such a construction of the two sections would harmonize under the teachings of *Kellett*.²²

However, even if this argument were not accepted there would not appear to be a bar for a member of the grand jury (*e.g.* its foreman) signing a verified complaint on information and belief based on the evidence presented to the grand jury, after the grand jury votes that a misdemeanor should be presented, and then filing the complaint in the appropriate inferior court.²³ This procedure would result in the familiar complaint being filed in the inferior courts, and permit the usual criminal procedures to be followed thereafter, without the confusion which might result from having indictments filed in the inferior courts.

2. Offenses arising in the militia when in actual service, and in the land and naval forces in the time of war, or which the State may keep, with the consent of Congress, in time of peace.

3. Offenses tried in municipal and justice courts;

4. All misdemeanors of which jurisdiction has been conferred upon superior courts sitting as juvenile courts;

5. A felony to which the defendant has pleaded guilty to the complaint before a magistrate, where permitted by law.

21. CAL. PENAL CODE § 740 (West 1956) states: "Except as otherwise provided by law, all public offenses triable in the inferior courts must be prosecuted by written complaint under oath subscribed by the complainant. Such complaint may be verified on information and belief."

22. According to CAL. PENAL CODE § 889 (West Supp. 1968), "[a]n indictment is an accusation in writing presented by the grand jury to a competent court, charging a person with a public offense." Thus, an indictment is not restricted to felonies; it may charge "public offenses." Why shouldn't the grand jury present an indictment charging a misdemeanor (a public offense) to an inferior court since under section 1425 and 1462 an inferior court would be competent over misdemeanors?

23. The foreman of the grand jury or a competent peace officer could prepare and sign an affidavit or declaration in support of a warrant for arrest if one is necessary, *i.e.*, if the defendant is not already in custody.

This same procedure could be followed when the grand jury determined that a misdemeanor should be filed under subdivision 1 of section 496, note 17 *supra*.

However, on balance, the practice which would appear to be the better of the two would be for the grand jury to present an indictment to the inferior court. No great violence is done to the relevant sections in adopting this practice.²⁴ Although it might at first be somewhat shocking to have indictments presented to inferior courts, if the idea is accepted rather than resisted, there is no reason why it cannot work. Furthermore, if an indictment is presented—rather than a complaint filed—there would be some authority to provide the defendant with a transcript of the proceedings before the grand jury, which culminated in his being charged by the grand jury with a misdemeanor.²⁵

D. Procedure Before a Magistrate

Assuming the prosecution has filed a complaint with a magistrate charging a felony and a misdemeanor, and the time for the preliminary examination has arrived, one of four results may be had:

First, the magistrate might find that the evidence failed to show the commission of any public offense, or that there is not sufficient evidence to believe the defendant guilty of any public offenses. In such a case, the defendant is discharged under section 871,²⁶ and, for the purpose of this article the matter is at an end.

Second, the magistrate might find that both a felony offense and a misdemeanor offense had been committed and that there is sufficient evidence to believe the defendant guilty of both offenses. Or third, the magistrate might find that only the felony offense had been committed, or that there is sufficient evidence to believe the defendant guilty of only the felony offense. Fourth, the magistrate might find that only the misdemeanor offense had been committed, or that there is sufficient evidence to believe the defendant guilty of only the misdemeanor offense.

24. See note 22 *supra*.

25. CAL. PENAL CODE § 938.1 (West 1956) authorizes the reporter to transcribe the proceedings conducted before the grand jury only when an indictment or accusation is presented against a defendant. If the grand jury foreman were to file a complaint on behalf of the grand jury, no indictment or accusation would have been presented. On the other hand, by presenting an indictment, albeit one presented to an inferior court charging a misdemeanor, the defendant would have a basis to demand a transcript of the proceedings; this would put an indicted misdemeanor on an equal footing with a defendant who is held to answer a misdemeanor charge after a preliminary examination, treated *infra*.

26. CAL. PENAL CODE § 871 (West 1956).

1. *Procedure if magistrate finds a felony only or a felony and a misdemeanor.*

If the magistrate should find that the felony offense alleged in the complaint was committed and that there is sufficient evidence to believe the defendant guilty thereof—the procedure is the same as it was before *Kellett*. Namely, the defendant is held to answer on the felony offense,²⁷ he is committed,²⁸ and the magistrate forwards all documents and matters pertaining to the case to the superior court.²⁹ An information would then be filed in the superior court³⁰ within fifteen days after the defendant's commitment.³¹ The information would allege that the defendant had committed the felony;³² pretrial and trial procedures would then follow in the superior court.

If the magistrate should find that both the felony and the misdemeanor had been committed and that there was sufficient evidence to believe the defendant guilty of both offenses, the procedure is basically the same as that followed when the defendant was held to answer only on the felony offense. However, the magistrate should hear and consider evidence relative to the misdemeanor offense.³³ More clearly, the magistrate should not close his eyes to all but felony offenses; he has the authority and duty to hear evidence as to *all* public offenses.³⁴ The magistrate should think simply in terms of *public offenses*, considering evidence as to all of those alleged in the complaint.

2. *Procedure if magistrate finds only a misdemeanor offense*

This brings us to the case wherein the magistrate finds only that a misdemeanor offense has been committed or the evidence

27. CAL. PENAL CODE § 872 (West 1956).

28. CAL. PENAL CODE § 873-877a (West 1956).

29. CAL. PENAL CODE § 883 (West 1956).

30. CAL. PENAL CODE § 737, 738 (West 1956).

31. CAL. PENAL CODE § 739 (West 1956).

32. *Id.* In this particular instance, the district attorney, if he believes the evidence before the magistrate showed that the misdemeanor had been committed and that the evidence was sufficient to believe the defendant guilty thereof, could under section 739 allege the misdemeanor count in the information even though the magistrate did not hold the defendant to answer on that count. But this is not the subject of this review.

33. See *People v. McKerney*, 257 Cal. App. 2d 64, 69-70, 64 Cal. Rptr. 614, 617-18 (1967).

34. See note 43 *infra*.

is sufficient to believe that the defendant is only guilty of a misdemeanor offense. In such a case, *People v. Hardin*³⁵ provides the procedural answer:

If the felony count is dismissed . . . the magistrate at the termination of the preliminary [examination] on motion of the People or the defendant or on his own motion . . . should order the defendant arraigned in the municipal court and a trial date fixed on the misdemeanor count.³⁶

In effect, the magistrate holds the defendant to answer on the misdemeanor offense, commits him for such purposes, and binds him over to the inferior court.³⁷ The magistrate has authority to admit such a defendant to bail.³⁸ If the magistrate sets a date and time for the defendant to appear in municipal or justice court for arraignment on a misdemeanor complaint 'as he would do in his order of commitment, to be held to answer, and to be arraigned on an information filed in the superior court) the usual pretrial and trial procedures can be followed in the inferior court.³⁹

It would appear that a defendant would not have a valid basis to complain about this procedure. Indeed, section 869⁴⁰ and 870⁴¹

35. 256 Cal. 2d 954, 64 Cal. Rptr. 307 (1967).

36. *Id.* at 961, 64 Cal. Rptr. at 312.

37. The magistrate would transfer all documents relating to the case to the appropriate inferior court. CAL. PENAL CODE § 883 (West 1956).

38. CAL. PENAL CODE § 1277 (West 1956), provides that: "When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus."

39. At this point, the defendant's right to a speedy trial as set forth in CAL. PENAL CODE § 1382(3) (West 1956), would, for the first time, commence to run. *See People v. McKerney*, 257 Cal. App. 2d 64, 70, 64 Cal. Rptr. 614, 617 (1967), and *People v. Hardin*, 256 Cal. App. 2d 954, 961-62, 64 Cal. Rptr. 307, 312 (1967).

40. CAL. PENAL CODE § 869 (West 1956), in pertinent part, reads as follows:

[Delivery of transcript by county clerk.] Sixth—In every case in which a transcript is filed as provided in this section, the county clerk shall deliver the original of said transcript so filed with him to the district attorney immediately upon his receipt thereof and shall deliver a copy of said transcript to each defendant (other than a fictitious defendant) at least five days before trial or upon earlier demand by him without cost to him; provided, however, that if any defendant be held to answer to two or more charges upon the same examination and thereafter the district attorney shall file separate informations upon said several charges, the delivery to each such defendant of one copy of the transcript of said examination shall be a compliance with this section as to all of said informations.

41. CAL. PENAL CODE § 870 (West 1956) provides:

The magistrate or his clerk must keep the depositions taken on the information

would give such a defendant a basis to demand that he be furnished with a transcript of the preliminary examination which culminated in his being held to answer on the misdemeanor offense.

Nor would the prosecution have a valid basis to complain about this procedure. Although the prosecution might disagree with the magistrate that the evidence failed to show the commission of a felony offense or that the evidence was sufficient to believe the defendant guilty of 2 felony offenses, the government need not file the misdemeanor complaint in the inferior court; it could refile a felony-misdemeanor complaint with a magistrate or it could take the matter before the grand jury.⁴²

E. Proceeding Under Section 995

The next consideration is: What is to be done in the event the defendant should bring a motion under section 995 to set aside either or both misdemeanor or felony counts, as alleged in the pleading?

There does not appear to be any authority under section 995 to treat the misdemeanor count as alleged in the information or indictment any differently than the felony count.⁴³ Nor does there appear to be any valid reason why the offenses should be treated differently. Thus, if on a motion under section 995 the superior court were to rule that the evidence is insufficient to support the

or the examination, until they are returned to the proper court; and must not permit them to be examined or copied by any person except a judge of a court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney general, district attorney, or other prosecuting attorney, and the defendant and his counsel; provided however, upon demand by defendant or his attorney the magistrate must order a transcript of the depositions taken on the information, or on the examination, to be immediately furnished said defendant or his attorney, after the commitment of said defendant as provided by sections 876 and 877 of this code.

42. The misdemeanor offense could be reconsidered in either of the subsequent proceedings since it would not be dismissed (*cf.* section 1387), assuming the pleading, alleging the misdemeanor offense, is filed in a court of competent trial jurisdiction within one year after the commission of the misdemeanor offense. CAL. PENAL CODE § 801 (West 1956).

43. That the misdemeanor count is probably subject to a motion under section 995, is another reason why the magistrate conducting a preliminary examination should permit evidence relevant to the misdemeanor offense to be heard. If the misdemeanor was not necessarily shown by the very evidence that showed the felony offense, the misdemeanor count would be vulnerable to a motion to set it aside under section 995.

misdemeanor count and therefore to set aside that count, the defendant would proceed to stand trial in the superior court on the felony count.⁴⁴

A different problem is created under section 995 if the superior court should set aside the felony offense as alleged in the information or indictment, thereby leaving only a misdemeanor count. By having set aside the felony, there no longer is a joinder of a misdemeanor which, under *Kellett*, was the basis for giving the superior court jurisdiction to try the misdemeanor offense. Therefore, by virtue of the order setting aside the felony, sections 1425 and 1462 (giving the inferior courts jurisdiction in misdemeanors) would become operative. It could be argued that the superior court retains jurisdiction to try the misdemeanor, since it initially had jurisdiction over the subject matter and the person when the defendant was arraigned on the information as originally filed.

But, if it were determined that it would be preferable to try the misdemeanor count in an inferior court, upon proper request, the superior court could order that the misdemeanor count be transferred to the appropriate inferior court under section 1462.2.⁴⁵ Here, the application of section 1462.2 would appear to

44. This assumes that the prosecution did not take an appeal from the superior court's order setting aside the misdemeanor count. Such an order would be appealable by the prosecution (section 1238, subd. 1); as the prosecution can take an appeal from an order under section 995 setting aside one count of a multiple count information or indictment. *People v. Agnello*, 259 Cal. App. 2d 785, 789, 66 Cal. Rptr. 571, 573 (1968). It also assumes the defendant did not obtain a writ of prohibition under section 999a based on the superior court's refusal to also order the setting aside of the felony count.

If the prosecution did not reinstate the misdemeanor count by prosecuting a successful appeal from the superior court's setting it aside under section 995, section 654, as construed by *Kellett*, would bar a subsequent prosecution of the defendant for the alleged commission of that misdemeanor offense.

45. CAL. PENAL CODE § 1462.2 (West 1956), as amended (Supp. 1968) reads as follows:

Except as otherwise provided in the Vehicle Code, the proper court for the trial of criminal cases amounting to misdemeanor shall be determined as follows: If there is a municipal or justice court, having jurisdiction of the subject matter of the case, established in the district within which the offense charged was committed, such court is the proper court for the trial of the case; otherwise, the court, having jurisdiction of the subject matter, nearest to the place where the offense was committed is the proper court for the trial of the case.

If an action or proceeding is commenced in a court having jurisdiction of the subject matter thereof other than the court herein designated as the proper court for the trial, the action may, notwithstanding, be tried in the

require a liberal construction. However, such a construction could be justified by the harmonizing of all relevant sections which is required by *Kellett*.⁴⁶

Alternatively, the superior court might dismiss the misdemeanor count on the ground that under sections 1425 and 1462 (and in the light of its order under section 995 setting aside the felony count) it no longer has jurisdiction. However, this procedure would probably be resisted by the prosecution; it would be fearful that by having dismissed the misdemeanor count, section 1387⁴⁷ would then bar any subsequent prosecution for the misdemeanor offense. On the other hand, a close reading of section 1387 would not appear to bar a subsequent prosecution for the misdemeanor; the dismissal would be based upon the lack of jurisdiction of the superior court, and not a "dismissal . . . as provided in [the chapter of the Penal Code in which Section 1387 is codified]."⁴⁸

Some courts might deem the use of section 1462.2 in the premises as stretching the language of that statute beyond recognition. Also, the prosecution may resist a dismissal under section 1387 (at least until there is definitive authority that it

court where commenced unless the defendant, at the time he pleads, requests an order transferring the action or proceeding to the proper court. If after such request it appears that the action or proceeding was not commenced in the proper court, the court shall order the action or proceeding transferred to the proper court. The judge must, at the time of arraignment, inform the defendant of his right to be tried in the district wherein the offense was committed.

46. See *People v. McKerney*, 257 Cal. App. 2d 64, 69, 64 Cal. Rptr. 614, 617 (1967).

47. CAL. PENAL CODE § 1387 (West 1956) reads: "An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony."

48. Section 1387 is found in Chapter 8 of Title 10 of Part 2 of the Penal Code. Chapter 8 contains sections 1381, 1381.5, 1382, 1383, 1384, 1385, 1386, and 1387. Since the defendant in the case posed under this heading is not in a state prison, a jail within this state or a federal prison on a charge unrelated to the one or ones which are the subject of the instant action, sections 1381 and 1382 are inapplicable. Since the defendant would not have been denied a speedy trial on the misdemeanor count at the point of time posed in our case section 1382 would be inapplicable. Nor would sections 1383, 1384 or 1386 have any application in the premises. Since the superior court can not dismiss an action under section 1385 if the grounds for the dismissal were cognizable by demurrer, section 1385 would be inapplicable since a demurrer in our case would lie. Therefore, since there would be no provision in Chapter 8 to permit the dismissal of the misdemeanor in our case, section 1387 would not be a bar to a subsequent prosecution of the defendant for that offense.

would not operate as a bar to a subsequent misdemeanor prosecution). For these reasons the better practice may be for the defendant to file a demurrer to the information or indictment in the superior court. If no demurrer is forthcoming, the court may handle the matter on its own motion.

Thus, after the superior court has granted the defendant's motion under section 995 and has ordered the felony count set aside, the only charge remaining is the misdemeanor offense. The superior court would then be without jurisdiction by virtue of sections 1425 and 1462.

The defendant could then properly bring a demurrer under subdivisions 1 or 5 of section 1004.⁴⁹ Of course, the defendant would have to move for and be granted permission to withdraw any previously entered pleas for the purpose of bringing his demurrer.

A demurrer would appear to be an acceptable solution for the prosecution. The granting of a demurrer is an appealable order for the government.⁵⁰ Therefore, the prosecution would have its full array of remedies: (a) it could appeal the order under section 995 setting aside the felony count; (b) it could file a new felony-misdemeanor complaint with a magistrate by granting the defendant's demurrer and not filing a misdemeanor complaint in an inferior court; (c) it could take the complaint before the grand jury. The defendant would still be subject to a prosecution for the misdemeanor offense if it were warranted by the evidence and not barred by the statute of limitations.

49. CAL. PENAL CODE § 1004(1) and (5) (West 1956) provides:

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

If in the given case the prosecution was brought by an information, subdivision 1 would be a good ground for a demurrer. But if it were brought by an indictment, this subdivision would not be good, for, as was shown earlier, a grand jury does have legal authority to inquire into misdemeanor offenses. Therefore, if the case was initiated by indictment, subdivision 5 would have to be used on the theory that since the indictment alleges only a misdemeanor sections 1425 and 1462 are a "legal bar" to the prosecution of the offense in the superior court.

50. CAL. PENAL CODE § 1238(2) (West 1956).

F. *Proceedings Under Section 1538.5*⁵¹

Once an information or indictment has been filed in the superior court which alleges a felony and misdemeanor, a defendant may bring a pretrial motion to suppress evidence under section 1538.5. In such motions to suppress, no particular count in the pleading need be the object of the motion. But a ruling on the motion to suppress may bar a prosecution of one or more of the charges alleged in the pleading. Hence, the superior court's ruling on a motion to suppress evidence can have a result similar to rulings under section 995.

If the superior court were to suppress all of the prosecution's evidence, the result would be no different than in any other case; the misdemeanor-felony pleading under *Kellett* presents no unusual problem. Similarly, if the motion to suppress were denied as to any of the prosecution's evidence, the result would be no different in a *Kellett* pleading than in any other case.

But, in suppressing only a part of the evidence in the possession of the prosecution, the result can be that there no longer remains sufficient evidence in the hands of the Government to support a prosecution on either the misdemeanor count or the felony count.⁵² If the prosecution no longer has sufficient evidence to support the misdemeanor charge, the felony charge would remain in the jurisdiction of the superior court. The trial date which had been set, presumably, at the defendant's superior court arraignment, would stand. Therefore, if the government wished to have appellate review of the court's ruling suppressing evidence, it should file a notice of intention to file a petition for a writ of prohibition or mandate in the court of appeal. Then, such petition should be filed in a timely manner.⁵³ If the prosecution did not

51. CAL. PENAL CODE § 1538.5 (West Supp. 1968).

52. It is, of course, conceivable that though only part of the evidence is suppressed there nonetheless would be insufficient evidence to support a prosecution in any of the courts. But such a ruling is tantamount to the type previously referred to, *i.e.*, where all the evidence is suppressed. Thus, in any such cases, the prosecution would be seeking appellate review by extraordinary writ or by appeal of the whole case.

53. See CAL. PENAL CODE § 1538.5(o) (West Supp. 1968). This procedure would stay trial of the felony until the court of appeal ruled on the prosecution's petition. It would have the effect of keeping the case in one piece. If the superior court's order were affirmed, the trial proceeds on the felony only. If the superior court's order were reversed, the trial would proceed in both the misdemeanor and felony as the prosecution would again have all of its evidence.

intend to seek appellate review of the superior court's order suppressing some of the evidence, the simplest procedure would be to so inform the superior court; at the same time it could inform the court that there no longer is sufficient evidence to support a prosecution of the defendant for the misdemeanor offense. On its own motion, the superior court could then properly dismiss the misdemeanor count.⁵⁴

In the event the superior court's ruling on the motion to suppress results in the prosecution no longer having sufficient evidence to support the felony charge, with the misdemeanor still standing, the matter would appear to be more properly within the jurisdiction of an inferior court.⁵⁵ In these cases, as distinguished from orders entered under section 995, the felony count technically remains in the pleading and the matter remains within the jurisdiction of the superior court. If the district attorney does not intend to seek appellate review of the ruling on the motion to suppress evidence,⁵⁶ the simplest procedure would be for him to so inform the superior court. He should also inform the court that there is no longer sufficient evidence to support a prosecution of the defendant for the felony offense; the superior court could then properly, on its own motions dismiss the felony count.⁵⁷

With the dismissal of the felony count, the case would be placed in substantially the same posture as would be a case where the felony count had been set aside under section 995. As discussed above, the defendant could then request the misdemeanor to be transferred to the appropriate inferior court under section 1462.2. The misdemeanor could be dismissed on the ground that the offense is within the jurisdiction of an inferior court under sections 1425 and 1462, and the prosecution could then file a misdemeanor complaint in the appropriate inferior court;⁵⁸ or, having requested and having been granted permission

54. See CAL. PENAL CODE §§ 1385, 1538.5(j) (West Supp. 1968).

55. CAL. PENAL CODE §§ 1425, 1462 (West 1956). See text accompanying note 45, *supra*.

56. If the prosecution intended to seek such a review, as in the situation where the superior court only suppressed the evidence which supported the misdemeanor count, the prosecution should file a notice of intention to file a petition for a writ of prohibition or mandate in the court of appeal and then file such a petition in a timely manner. See also, note 53 *supra*.

57. See CAL. PENAL CODE §§ 1385, 1538.5(j) (West Supp. 1968).

58. See note 48 *supra*, for the proposition that such a dismissal would not be a bar to a subsequent prosecution of the defendant for the misdemeanor offense. Recall that in

to withdraw his previously entered pleas, the defendant, for the same reasons as discussed under the problems arising under section 995, could demur to complaint under subdivisions 1 and 5 of section 1004. If the defendant's demurrer were granted, the prosecution could then file a misdemeanor complaint in the appropriate inferior court.

G. *Pleas Entered Before a Magistrate*

One word of caution should be given to the taking of pleas of guilty by a magistrate. The caveat applies when a defendant wishes to enter a plea of guilty to a misdemeanor charged in the complaint filed with the magistrate, and the district attorney then moves to dismiss the felony count (or the defendant is otherwise discharged from the felony count).

In *People v. Hardin* the court remarked:

It would seem that once a defendant is charged with a felony and a misdemeanor in the same complaint, arising out of the same act or set of circumstances, the magistrate must hear the matter at a preliminary hearing. He must advise the defendant of his rights [citations omitted] which advice does not include, of course, an arraignment, and does not include advising the defendant of his rights to a jury trial, a speedy trial and the trial date. Such procedure must be distinguished from an arraignment for trial. It is clear that an appearance before a magistrate does not invoke trial court jurisdiction.⁵⁹

Hence, a defendant who is before a magistrate has not been arraigned by a court on the charges alleged in the complaint. In the absence of an arraignment, a valid judgment cannot be entered in a criminal case.⁶⁰

Furthermore, a "magistrate" is not a "court"—inferior or otherwise;⁶¹ the magistrate is a creature of statute.⁶² There is no

this situation it would be the felony—not the misdemeanor—which had been dismissed under section 138.5.

59. 256 Cal. App. 2d at 961, 64 Cal. Rptr. at 312.

8 60. See *People v. Gaines*, 52 Cal. 479 (1877) and *People v. Corbett*, 28 Cal. 328 (1865).

61. A judge who sits as a magistrate does not carry his court or his judicial attributes with him except to the extent that they inhere in the office of magistrate. *Amos v. Superior Court*, 182 Cal. App. 2d 343, 6 Cal. Rptr. 252 (1960). Whatever the inherent powers of courts from which a magistrate comes to conduct a preliminary examination may be, those powers do not inhere in him while he is acting as a magistrate. *Fursdon v. Los Angeles County*, 100 Cal. App. 2d 845, 223 P.2d 520 (1950).

62. *People v. Brite*, 9 Cal. 2d 666, 683, 72 P.2d 122, 131 (1937); *People v. Cohen*,

statutory authority for a magistrate to render a judgment, grant probation, etc., in a criminal case.⁶³ Since a defendant who pled guilty to a misdemeanor offense before a judge of an inferior court, (acting as a magistrate) would not have been arraigned in a trial court, no trial court jurisdiction could have been invoked in the premises; the magistrate would have no authority to render a judgment in the case. Such a plea would be a nullity.

Yet, it is not uncommon for a defendant to plead guilty to a misdemeanor in a felony-misdemeanor complaint, which is before a magistrate for a preliminary examination, and after his plea the defendant is discharged from the felony. In such cases, the prosecution should file a misdemeanor complaint in the appropriate inferior court. This can be with the same judge who is acting as a magistrate on the felony-misdemeanor complaint, *i.e.*, the judge can take off his magistrate's hat. At that point, the defendant can be duly arraigned on the misdemeanor complaint. The judge can then proceed to act as the circumstances of the case warrant; the defendant can plead guilty to the charge and a valid judgment can be rendered by the judge. After the defendant has pled guilty to the charge alleged in the misdemeanor complaint, the judge can then put on his magistrate's hat and on the motion of the prosecution or because of a lack of evidence (no evidence having been produced and the prosecution having rested), he may, as a magistrate, discharge the defendant from the charges pending before him.

There is, however, one exception to the above procedure. With the 1969 amendment to section 17 of the Penal Code,⁶⁴ a case may arise wherein the magistrate has found that the felony charge pending before him should be a misdemeanor. In such a case, both parties may consent to this charge being made a misdemeanor. Yet the district attorney may not want to accept a plea of guilty to the misdemeanor with the understanding that the defendant be discharged from the felony charge.⁶⁵

118 Cal. 74, 78, 50 P. 20, 21 (1897); *People v. Swain*, 5 Cal. App. 421, 425, 90 P. 720, 722 (1907).

63. The one exception will be discussed *infra*.

64. See note 45 *supra*, and accompanying text.

65. Such a case may arise. The felony charged might be a violation of CAL. PENAL CODE § 261(1) (West 1956) (statutory rape), which can be made a misdemeanor by sentence (CAL. PENAL CODE § 264) (West 1956). The misdemeanor alleged as such might

If the defendant then pled guilty to the felony which the magistrate determined to be a misdemeanor and the district attorney dismissed the misdemeanor alleged as such in the complaint, the magistrate would appear to have jurisdiction to accept the plea and to render a judgment in the case. Section 17 of the Penal Code would appear to give the magistrate authority to do this. Therefore, in this limited situation, the prosecutor would not have to file a new misdemeanor complaint in an inferior court but could proceed on the original felony-misdemeanor complaint which had been filed with the magistrate.⁶⁶

CONCLUSION

The supreme court's command in *Kellett* has drastically changed the pleading practices in criminal actions. All concerned with such practices and procedures must adjust their thinking. Problems appear when the *Kellett* rule (that a misdemeanor charge must be joined with a felony charge when they arise out of same act or omission) is applied to a system accustomed to the simple rule that all felonies are tried in superior court and misdemeanors in inferior courts. However, these problems are not insurmountable. Some practical solutions have been offered herein. If these problems are analyzed and all statutory provisions are interpreted in the spirit of *Kellett*, a workable system will evolve.

be a violation of CAL. PENAL CODE § 242 (West 1956) (battery), a misdemeanor [CAL. PENAL CODE § 243 (West 1956)]. While the district attorney may agree that the statutory rape charge should under the facts be made a misdemeanor he may prefer that the defendant stand convicted of an offense which more closely describes the facts of the case rather than having the defendant stand convicted of a more ambiguous misdemeanor. Similarly, the defendant may be willing to plead guilty to the same statutory rape charge knowing it will be made a misdemeanor rather than risk a conviction for the same offense with the possibility that it would remain a felony.

66. For administrative purposes, the municipal or justice court judge acting as a magistrate may well wish to change the number on this complaint so that it would thereafter be filed and indexed as a misdemeanor complaint.