McGeorge Law Review

Volume 4 | Issue 2 Article 21

7-1-1973

The Omnibus Hearing: A Proposal for California Criminal Pretrial Motion Procedure

James F. Geary
University of the Pacific; McGeorge School of Law

The Omnibus Hearing: A Proposal For California Criminal Pretrial Motion Procedure

Beginning in the early 1960's the United States Supreme Court expanded the rights of criminal defendants. To protect these rights, courts and state legislatures had to create a supporting procedure, often expressed in terms of pretrial motions. This in turn has contributed to the excessive delays and complexity of criminal trials. To solve this problem and still protect the rights of defendants, several jurisdictions have attempted an omnibus hearing which requires that all pretrial motions be made at one time. The author assesses the merits of these pretrial motion projects in light of existing California law. He also identifies the essential elements which should be included in any legislation enacted to require an omnibus hearing.

> The effect of our exaggerated contentious procedure is . . . to give the whole community a false notion of the purpose and the end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it . . . .[1]

Applied to the context of criminal procedure, these words of Roscoe Pound to the American Bar Association in 1906 are more timely today than ever before. Perhaps the procedural area most vulnerable to criticism is that of pretrial motions. In recent years one solution which appears to offer some relief in terms of judicial efficiency and fairness is the omnibus hearing.

The need for a hearing in our judicial system which consolidates consideration of pretrial issues is painfully apparent. The last decade has witnessed rapidly expanding recognition of rights available to criminal defendants, based primarily on a liberal interpretation of the due process clause of the United States Constitution.[2] The procedural

1. Address by Dean Roscoe Pound, American Bar Association, 1906, *reprinted,* American Judicature Society, The Causes of Popular Dissatisfaction with the Administration of Justice (1956).

2. A brief but comprehensive summary of many of the crucial criminal procedure cases which the United States and California Supreme Courts have decided in

machinery simply has not kept pace with the substantive changes in the rights of criminal defendants.[3] Under existing procedure it has become increasingly difficult to reconcile the right to a speedy trial with adequate protection of the defendant's new substantive rights.[4]

The procedural problems resulting from this situation are particularly acute in the area of pretrial motions.[5] According to an ABA advisory committee,[6] the "cumbersome and often exasperatingly time-consuming" pretrial motion practice is one of the major impediments to criminal justice.[7] At a recent seminar of criminal lawyers in California the observation was made that the making of pretrial motions has developed into such a highly specialized field that it may consume more of an attorney's time than the actual trial.[8]

It has become apparent that the expansion in substantive rights has significantly increased the opportunity to challenge the judicial process by way of a motion. As challenges have increased, the efficiency of the judicial system has decreased. In addition, the new bases for motions have further fragmented mechanics for presentation and entertainment of pretrial motions. Thus the two effects of expanded substantive rights are (1) delay and (2) accentuated lack of uniformity in motion-making mechanics.

Frequently in criticisms of the undue delay resulting from the use of pretrial motions, trial lawyers themselves are often held responsible. In remarks to the American Bar Association, Chief Justice Warren Burger severely criticized defense attorneys for the "increasing use . . . of dilatory and time-consuming pretrial motions."[9] The Chief Justice proceeded to recommend disciplinary action against those lawyers who most abuse the process.

Such disenchantment, albeit justified, does not reflect the fact that our adversary system often encourages the manipulation of available procedural devices by terminating cases in favor of the manipulator, us-

---

the last decade can be found in a recent report issued by a California superior court committee. See California Superior Court (Los Angeles County), Report of the Special Judicial Reform Committee app. I, exh. D (Feb. 1971).

3. *Id.* at 1.

4. Tobriner, *Special Introduction to* 4A CALIFORNIA FORMS OF PLEADING AND PRACTICE ANNOTATED, *Criminal Procedure* 2-3 (1971).

5. "And, perhaps, the most significant application of these new applications of due process protections have been in the pretrial and trial procedures of the criminal law." *Id.*

6. The ABA Advisory Committee on Discovery and Procedure Before Trial.

7. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 24 (Approved Draft 1970) [hereinafter cited as ABA MODEL CODE].

8. Katz, *Foreward to* CALIFORNIA TRIAL LAWYERS ASSOCIATION, 3RD ANNUAL SEMINAR, LATEST DEVELOPMENTS IN CRIMINAL LAW (1972).

9. Address by Chief Justice Warren E. Burger, before the American Bar Association, San Francisco, Ca., Aug. 14, 1972, *reprinted*, 93 S. Ct. 3, 4 (preface).

ually the defense attorney.[10] There is little dispute that the delay of trial usually works to the advantage of the defendant. A legal aid attorney observed that in the past few years many of his clients have become aware of the pretrial motion as a tactic which can be an effective weapon regardless of the legal justification for the motion itself.[11] Under pressure to take advantage of all available procedural devices, the attorney will often file one or more motions.[12] Thus at separate hearings numerous motions are made which have little chance of success but which achieve the desired objective: postponement of the trial.[13] It is not unusual for the same trial to be postponed more than a dozen times.[14]

To condemn the attorney for taking advantage of such a system is futile.[15] Rather than requiring counsel to forfeit an advantageous position allowed by the present system, the system should be changed to effect the desired efficiency and responsiveness. Chief Justice Burger concedes that the real fault lies in the failure of the judiciary and legislature to respond to Dean Pound's warnings to bring the judicial process up to date.[16]

In California the problem of delay is compounded by the fact that there is no uniform and comprehensive statutory scheme governing pretrial motions in criminal cases. Although there has been some standardization of individual motions in the recent past by both the legislature[17] and judiciary,[18] most pretrial procedure is determined by local court jurisdictions and individual judges.[19] This decentralized approach has resulted in uncertainty as to the limits of judicial discretion[20] and a provincialism which is unrealistic for the administration of an efficient court system.[21] This lack of state-wide uniformity is reflected in the paucity of material on the subject in the standard texts of Cali-

10. Pound, *supra* note 1.
11. J. MOYER ,THE LAWYERS 194 (1968).
12. Burger, *supra* note 9, at 6.
13. Younger, *The Bar: Part of the Solution or Part of the Problem?*, 5 BEVERLY HILLS BAR J. 36-37 (1971).
14. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 931 (1970).
15. Pound, *supra* note 1.
16. Burger, *supra* note 14, at 929.
17. *E.g.*, CAL. PEN. CODE §1538.5.
18. B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE 25 (1963).
19. 4A CALIFORNIA FORMS OF PLEADING AND PRACTICE ANNOTATED, *Criminal Procedure* 67 (1971) [hereinafter cited as CALIFORNIA FORMS].
20. For a classic case of a superior court judge attempting to define his discretion in the pretrial motion field see Saidi-Tabatabai v. Superior Court, 253 Cal. App. 2d 257, 61 Cal. Rptr. 510 (1967).
21. The mobility of the modern lawyer makes it rather difficult for the lawyer to rely on his relationship with the court clerk or the district attorney when he is determining the particular procedure he is to follow. For a description of this type of procedure see CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PRACTICE 341 (1964) [hereinafter cited as CEB CRIMINAL LAW].

fornia criminal advocacy.[22] Professor Witkin, one of the foremost authorities on California law, cites his volume on civil procedure as a general guideline for almost the entire criminal pretrial motion field.[23] Such cursory treatment belies the crucial impact pretrial motions often have on the disposition of a case.[24] Procedural prerequisites should not be permitted to remain in a position of confusion and uncertainty.[25] The need for a uniform system is evident.

One of the most promising proposed solutions has been the omnibus pretrial hearing.[26] In the past five years this concept has been developed and tested in several jurisdictions throughout the country[27] in the hope that it would provide an efficient procedure for the presentation of, decision upon, and appellate review of all pretrial motions.[28] This comment will briefly review the omnibus hearing programs now being tested, together with the most recent proposals to the California Legislature for general use of such a hearing. The analysis will consider current California pretrial procedure and recommend legislation which meets the objectives of both the omnibus pretrial hearing and the development of due process rights of the criminal defendant in California.

HISTORICAL DEVELOPMENT OF THE OMNIBUS HEARING

The first proposal for an "omnibus hearing"[29] appeared in 1967 in a recommendation by the ABA Advisory Committee on Discovery and Procedure Before Trial[30] with the following stated objective: "To bring together at one court appearance as much as possible of the court actions required prior to trial."[31] The basic proposal as outlined by the committee is relatively self-explanatory:

> 5.3 Omnibus Hearing.
>
> (a) At the Omnibus Hearing, the trial court on its own initiative, utilizing an appropriate check-list form, should:
>
> (i) ensure that the standards regarding provision of counsel have been complied with;

22. *See* B. WITKIN, *supra* note 18, at 24-25; CEB CRIMINAL LAW 340-41; CALIFORNIA FORMS 65-70.
23. B. WITKIN, *supra* note 18, at 24.
24. Lynch, *Pre-Trial Motion Practice in State Criminal Cases—Part I*, 51 CHICAGO B. REC. 273 (1970).
25. ABA MODEL CODE 25.
26. *Symposium—Why the Omnibus Hearing Project?*, 55 JUDICATURE 377 (1972).
27. R. NIMMER, THE OMNIBUS HEARING: AN EXPERIMENT IN RELIEVING INEFFICIENCY, UNFAIRNESS AND JUDICIAL DELAY 21 (1971).
28. *Id.* at 1.
29. The unusually wide variety of pretrial purposes designed to be covered by the hearing makes the term "omnibus" particularly apt.
30. Nimmer, *A Slightly Movable Object: A Case Study in Judicial Reform in the Criminal Justice Process—The Omnibus Hearing*, 48 DENVER L.J. 179 (1971).
31. ABA MODEL CODE 115.

(ii) ascertain whether the parties have completed the discovery required in sections 2.1 and 2.3, and if not, make orders appropriate to expedite completion;

(iii) ascertain whether there are any additional disclosures under sections 2.4, 2.5 and 3.2;

(iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continued portions thereof;

(v) ascertain whether there are any procedural or constitutional issues which should be considered;

(vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a Pretrial Conference; and

(vii) upon the accused's request, permit him to change his plea.

(b) All motions, demurrers and other requests prior to trial should ordinarily be reserved for and presented orally at the Omnibus Hearing unless the court otherwise directs. Failure to raise any prior-to-trial error or issue at this time constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it. Check-list forms should be established and made available by the court and utilized at the hearing to ensure that all requests, errors and issues are then considered.

(c) Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearing, or formal presentation is necessary for a fair and orderly determination of an issue, the Omnibus Hearing should be continued from time to time until all matters raised are properly disposed of.

(d) Stipulations by any party or his counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(e) A record should be made of all proceedings at the hearing; such a record may be either a verbatim record, or a summary memorandum (dictated or written on an appropriate court-established form) indicating disclosures made, rulings and orders of the court, stipulations, and any other matters determined or pending.[32]

32. ABA MODEL CODE 20-21, supp. 6-7.

The singular objective previously cited in the ABA report,[33] coupled with the simplified procedure outlined immediately above, does not effectively expose the numerous and significant objectives the ABA proposal actually promotes. The following brief summary of it's "primary purpose" reveals a desire for the solution of most of the infirmities currently found in pretrial procedure:

> Establishment of court control over the scheduling and flow of cases; identification, clarification, and disposition of latent and apparent issues so as to promote decisional certainty and fairness; use of the hearing itself as a context in which to determine, wherever possible, issues which could otherwise be deferred until later in the process; enforcement of a program of full disclosure by the prosecution and the resulting increases in the frequency and fairness of nontrial dispositions—all of these are objectives of the hearing.[34]

In the past few years a few federal district courts have implemented the ABA omnibus hearing project.[35] However, in spite of broadly stated objectives, this implementation has usually reflected only specific parts of the ABA proposal[36] as each court primarily utilized only those parts of the hearing designed to alleviate its own particular problem or problems. For example, the District Court, Western District of Texas, found that its requirement that motions be written for all pretrial actions was inordinately time-consuming.[37] In adopting the omnibus hearing the court eliminated this problem by permitting oral motions except in unusual circumstances.

The original and best known of the experiments with the ABA proposal is the omnibus hearing procedure tested in the District Court for the Southern District of California. During its five year history the procedure has been the subject of both high praise[38] and severe criticism.[39] One of the reasons for this dichotomy appears to be the fact that during its brief history the hearing has experienced significant shifts in emphasis from one objective to another.[40]

---

33. See text accompanying note 31 *supra.*
34. R. NIMMER, *supra* note 27, at 53.
35. United States District Court, Western District of Texas, and United States District Court, Southern District of California.
36. R. NIMMER, *supra* note 27, at 21.
37. *Symposium, supra* note 26, at 380.
38. "Although the collection of conclusive data has not been possible, in the opinion of the judges and many of the lawyers involved, the new procedures expanded discovery [and] appear to be working well and fulfilling the objectives sought . . . ." ABA MODEL CODE 9.
39. "The conclusions of this research were, simply stated, that the sole positive accomplishment of omnibus in 1967 as well as 1970 was to establish broadened discovery procedure. All of the other objectives of the process were either substantially unperformed or were performed poorly." Nimmer, *supra* note 30, at 188.
40. See generally Nimmer, *supra* note 30.

For example, one of the primary purposes for the implementation of the hearing in the California district was expeditious disposition of all pretrial issues.[41] It soon became apparent, however, that in order to preserve the burgeoning field of discovery allowed to defendants, more time and effort had to be permitted for this area of litigation. The result was that the hearing did "contribute to the success of obtaining discovery for the defense, but it did so at substantial costs in time to the court."[42]

It should be noted, however, that the inability of a judicial procedural reform to meet all its professed objectives does not invalidate the reform itself. Even Raymond Nimmer,[43] probably the California project's most severe critic, cautioned, "It is important to avoid the notion that the transition experienced [by the district court] in San Diego by the omnibus hearing represented a perversion of effective reform."[44] He then explained that what actually happened was a rational modification of a broad-ranging procedure into a narrower one, more closely aligned to the district's present system.[45] His observation that all attempts to institute an omnibus hearing must take into account "the results and rationale of the pre-existing system"[46] is a crucial insight into avoiding at least some of the pitfalls of previous omnibus projects.

Federal districts have not been the only courts involved in such programs. A few states have attempted omnibus pretrial hearing programs on a more limited scale than envisioned by the ABA proposal. Since 1965 Texas has provided for a pretrial hearing primarily to entertain motions presented by the defense.[47] Although not termed an omnibus hearing in the code which provides for the procedure, it has all the same basic ingredients: a comprehensive procedure to present pretrial motions in a uniform and efficient manner. New York recently enacted an omnibus program which provides for two separate hearings.[48] The first hearing consists of nine separate motions attacking the indictment or information which now must be combined in a single omnibus hearing.[49] The other hearing provides for a single motion for a defendant who

41. ABA MODEL CODE 2, 9.
42. R. NIMMER, *supra* note 27, at 14.
43. Raymond Nimmer is a research attorney for the ABA advisory committees. He has devoted a significant amount of time in the past few years to investigating and reporting on the omnibus project of the district court in San Diego. He has written two reports on the San Diego experience which are cited in notes 27 and 30 *supra*.
44. R. NIMMER, *supra* note 27, at 74.
45. R. NIMMER, *supra* note 27, at 74-75.
46. Nimmer, *supra* note 30, at 184.
47. TEX. CODE CRIM. PROC. art. 28.01 (1965).
48. N.Y. CIV. PRAC. LAW arts. 210, 710.
49. N.Y. CIV. PRAC. LAW §210.20 (McKinney 1971).

> (a) is aggrieved by an unlawful or improper acquisition of evidence and has reasonable cause to believe such may be offered against him in a criminal action.
>
> (b) claims that improper identification testimony may be used against him . . . .[50]

The latter code section is not unlike California Penal Code Section 1538.5, which could appropriately be termed a "mini-omnibus" in the area of search and seizure.

In contrast to the many stated objectives of the federal districts' omnibus hearings, both New York and Texas expressly concentrated their efforts in providing a uniform and efficient procedure for criminal pretrial motions.[51] Only when the scope of the omnibus hearings has thus been expressly limited has the experiment lived up to the promise of its stated objectives.[52]

As previously discussed, California has the same difficulties that have led other jurisdictions to consider omnibus hearings.[53] Implementation of this type of hearing has been contained in recently proposed legislation in California.[54] For example, Senate Bill 649 (1972 Regular Session) provided for an omnibus pretrial hearing for many of the motions available in criminal cases.[55]

In addition, recently published California criminal procedure books, such as *California Forms of Pleading and Practice, Criminal Procedure*,[56] have outlined the ABA proposal in anticipation of the adoption of some form of the omnibus hearing in the state. Even more recently, the Select Committee on Trial Court Delay recommended the use of an omnibus hearing in which all pretrial motions would be made.[57]

---

50. N.Y. CIV. PRAC. LAW §710.20 (McKinney 1971).
51. See text accompanying notes 47-50 *supra.*
52. R. NIMMER, *supra* note 27, at 75.
53. See text accompanying notes 17-25 *supra.*
54. S.B. 649 and 936, 1972 Regular Session; S.B. 1125, 1971 Regular Session; S.B. 1083, 1970 Regular Session. All of these bills have involved similar proposals involving an omnibus hearing for pretrial motions in criminal cases. Gradually the bills have evolved into a compromise measure between prosecution and defense oriented legislators. The 1972 Senate passed S.B. 649 but the assembly committee studying the proposal did not approve the measure. As a result the proponents of the project intend to resubmit a revised bill for consideration during the 1973-74 legislative session.
55. The hearing would have included motions to determine admissibility of evidence of a pretrial identification of the defendant; motions for discovery; motions for separate trials; motions to remove the action from which the action is pending; motions to consolidate issues relating to preliminary facts per Section 400 of the Evidence Code; and such other motions as the court may require by rule.
56. CALIFORNIA FORMS 70-71.
57. California Select Committee on Trial Court Delay, Report No. 6, at 140 (June 1, 1972). The Select Committee was an ad hoc committee appointed by the Chief Justice of the California Supreme Court to investigate and recommend improvements in the trial court procedure of California. Composed of prestigous mem-

AN OMNIBUS HEARING FOR CALIFORNIA

A. *California Criminal Pretrial Motion Procedure*

To ascertain what type of omnibus hearing would be effective in California, an understanding of the present California pretrial procedure is essential.[58] As mentioned, one weakness of the federal court experience in California was the inconsistency between the objectives of the hearing and the realities of the present system.[59]

Perhaps the most deficient aspect of California criminal pretrial motion practice is that it lacks consistency. The Penal Code does not provide a general scheme for requesting and presenting pretrial motions.[60] As a result the lower courts generally rely on the California Code of Civil Procedure to determine the standard procedure required for motions filed in criminal cases.[61] There is nothing, however, which mandates the use of civil procedure rules. Except for a few statutory rules for criminal motion procedure[62] and some rules adopted by the Judicial Council,[63] local courts have broad discretion both as to form and substance of pretrial motions in criminal cases.[64] This provincialism has led more than one commentator to recommend that the newly arrived defense counsel visit the local court clerk or district attorney to be briefed on the particular requirements of the courts of that district.[65] It has even been suggested that one must find out the particular requirements of the individual judge who is to pass on the motion.[66]

The lack of statutory guidance appears to have significant consequences.[67] The formalities for the presentation of the motion can be highly confusing. In many cases the attorney,[68] and at times the court itself,[69] is unsure of such elementary requirements as the proper

bers of the judicial system in California, they compiled their findings and proposals in a series of booklets which have recently been published. The committee has now been disbanded.

58. "The lesson is apparent in preparing to seek reform of the process in any jurisdiction: it is essential to examine the results and rationale of the pre-existing system. . . ." Nimmer, *supra* note 30, at 184.

59. See text accompanying notes 40-49 *supra*.

60. CALIFORNIA FORMS 65.

61. CALIFORNIA FORMS 68.

62. *E.g.*, CAL. PEN. CODE §§995, 1538.5.

63. B. WITKIN, *supra* note 18, at 25.

64. CALIFORNIA FORMS 69.

65. CALIFORNIA FORMS 67.

66. *Hearings on the Omnibus Pre-Trial Hearing Before the California Assembly Interim Committee on Criminal Justice*, September 25-26, 1972, at 27 [hereinafter cited as *Hearings on the Omnibus Pre-Trial Hearing*].

67. CALIFORNIA FORMS 67.

68. The confusion of such an attorney is graphically illustrated in the testimony before an assembly interim committee investigating the omnibus hearing potential in California. See *Hearings on the Omnibus Pre-Trial Hearing* 57-58.

69. See note 20 *supra*.

court to entertain the motion,[70] the notice required,[71] and whether oral or written presentation is necessary.[72] At times such confusion creates disputes concerning whether the motion has actually been made.[73]

The problem becomes magnified by the intricate interplay in the use of pretrial motions.[74] For example, a motion for severance of defendants may be raised if a change of venue is denied, whereas a motion for continuance may depend upon a motion to amend plea. With the previously discussed increase in the use of the pretrial motions,[75] the problem will undoubtedly become more acute unless the procedure is improved.

B. Requirements for a California Omnibus Pretrial Hearing

In light of the fact that no consistent procedure exists for presentation of pretrial motions, the proposed solution, which necessarily must take into consideration existing procedure, is limited in only one respect: whatever ultimately is adopted must be uniform throughout the state. Therefore, in implementing an omnibus hearing, it should be mandatory that all motions which can be made before trial are made at the hearing. These would include, but not necessarily be limited to: motions to set aside indictment (pursuant to Penal Code Section 995); motions to suppress evidence (Penal Code Section 1538.5); and motions for discovery, joinder, consolidation, venue change, severance and jurisdictional challenges.

The hearing itself should be structured to ensure the effectiveness and integrity of the criminal procedure system. To do so it appears essential that the following considerations find expression somewhere within the text of the proposal: a formal proceeding; a waiver upon failure to make specific motions at the hearing; appellate review of the resolution of the motions requested; time limitations; and maintenance of a permanent record of the hearing. These minimum requirements are the subject of the remainder of this comment.

1. A formal proceeding for the presentation of pretrial motions

To achieve the desired increase in efficiency and certainty, the proceeding must be more than a pretrial conference to entertain stipula-

70. CALIFORNIA FORMS 67.
71. *Id.*
72. CEB CRIMINAL LAW 340-41.
73. CALIFORNIA FORMS 65-66.
74. Bruder, *Pretrial Motions in Texas Criminal Cases,* 9 HOUSTON L. REV. 641 (1972).
75. See text accompanying notes 9-14 *supra.*

tions and seek settlement. Therefore the rulings on the motions should be final, subject only to specified judicial review. The proceeding itself must be formal, requiring at a minimum that the motions be made in open court and that a permanent record be maintained. The hearing should also be formally noticed with a petition for hearing indicating which motions will be made.

The advantage of a formal proceeding in an effective judicial system is that it will provide a rational method of presenting and adjudicating motions. As mentioned earlier there is often an intricate interplay among motions.[76] Through a formal hearing an opportunity will be given to the court to consider the wisdom and applicability of each motion not in isolation but as it relates to other motions made.

The requirement that all motions be made at the same hearing should be a significant improvement over the present procedure which allows single motions to be made over a substantial period of time at separate hearings. The actual mechanism for the presentation of a motion could be handled in a variety of ways. Some of the previous omnibus hearing projects have provided for a checklist of motions to be used by counsel.[77] On a specified form counsel checks all the motions available, either affirmatively or negatively. At the hearing the motions are argued orally before the judge. Of course, if it becomes obvious during the hearing that a motion not affirmatively checked is now in order, counsel should be permitted to make the appropriate change.[78]

The use of such a checklist gives rise to a controversy over whether oral or written motions should be required. Current procedure in California varies from court to court. As stated in a publication of the Continuing Education of the Bar,

> Whether to move orally, or in writing . . . often depends on a variety of factors: the local practice, the seriousness of the offense charged, the importance of the particular proceeding in the outcome of the case, and the defense counsel's relationship with the district attorney's office.[79]

The common law[80] and the ABA proposal[81] both provide for oral motions in the absence of statutory exceptions. The argument in favor of oral motions is strong. For example, in one omnibus hearing project the elimination of written motions was considered one of the hearing's most significant advantages. It was felt that the repetitious use

76. See text accompanying note 74 *supra.*
77. CALIFORNIA FORMS 70.
78. 1 CRIMINAL PROCEDURE SOURCEBOOK 454 (B. George, Jr., ed. 1970).
79. CEB CRIMINAL LAW 340-41.
80. CALIFORNIA FORMS 70.
81. ABA MODEL CODE 114.

of preprinted forms, complete with points and authorities, fulfilled little function other than to contribute to the mass of documents already required by our judicial process.[82]

One of the most commonly cited disadvantages of oral motions is the tendency of counsel to make unwarranted motions simply due to the nature of this type of procedure. Without the necessity of filing the arguments in favor of the motions in written form prior to the hearing, counsel may be inclined to make oral motions without adequate prior preparation.[83] A recent study of the San Diego federal court's omnibus hearing, which permits oral motions, indicated the apparent ease of making motions resulted in some rather spurious issues becoming involved in the hearing.[84] The eventual conclusion of these issues was usually abandonment without contest or judicial decision.[85]

The written motion requirement has some significant qualities which should be considered. The effort expended to draw up the papers helps to preclude the filing of unnecessary motions.[86] In other cases the research involved may indicate to counsel the futility of making the motion.[87] There is also the undeniable advantage that the actual filing of the motion with supporting briefs gives notice plus a reasonable outline of the issues to opposing counsel. Many of the present recommendations for California omnibus projects require a written motion.[88] The Select Committee on Trial Court Delay recently endorsed the following proposal:

> All pretrial motions shall be in writing and shall be filed and served no longer than ten days preceding the hearing date. All notices of motion shall be accompanied by statements of the points relied upon and citations of authorities.[89]

As previously indicated, however, one common method to avoid the effort of drawing up each motion is to keep forms for the individual motions, complete with case authority.[90] After making a few judicious insertions the motion is ready to be filed. To some extent this procedure negates the aforementioned desirable effects. The solution may

82. *Symposium, supra* note 26, at 377.
83. Miller, *The Omnibus Hearing*, 5 SAN DIEGO L. REV. 293, 297 (1968).
84. "It is relatively easy to circle a motion on the 'action taken' form with little consideration of actual merits. . . . [U]ltimately, however, many of the motions are proven frivolous." *Id.*
85. R. NIMMER, *supra* note 27, at 64-65.
86. Miller, *supra* note 83, at 298.
87. Judge Kolts of the Los Angeles Superior Court recently testified that the use of the written motion "cut down very materially on the motions presented to the court." *Hearings on the Omnibus Pre-Trial Hearing* 36.
88. For example, S.B. 649, S.B. 936, 1972 Regular Session.
89. California Select Committee on Trial Court Delay, Report No. 6, at 140 (June 1, 1972).
90. *Hearings on the Omnibus Pre-Trial Hearing* 36.

be a combination of both oral and written motions. The requirement of a written motion filed prior to the hearing would be the general rule, with the availability of oral motions during the hearing if warranted.[91]

The omnibus hearing project in the Western District of Texas provided another type of procedure. The general rule provided for oral motions with the court empowered to request written briefs in special circumstances.[92] The effect of permitting both written and oral motions is that the parties could devote more time to briefing and researching the more difficult and unique questions of law as required by the court. In a recent symposium composed of participants in the Texas omnibus hearing program, this combination of oral as well as written motions was labelled "one of the most important advantages of the project."[93]

The basic reason for permitting oral motions during the hearing is the distinct possibility that the need for some motions may not become evident until the hearing is in progress. If a written motion is required, a continuance of the hearing would be necessary. This would defeat the stated purpose of the hearing, *i.e.*, to present all pretrial motions at one time. This purpose is ensured only by strict application of the next requirement of the omnibus hearing: an implied waiver of the right to make any motions after the hearing.

2. A waiver of the right to make motions at later proceedings

If a motion that could be made at the omnibus hearing is not made, a waiver is presumed unless there are extraordinary circumstances or opposing counsel stipulate that particular issues be reserved for trial. The presumption of waiver is a crucial element of the omnibus hearing.[94] With the hearing's professed objective of the efficient resolution of *all* pretrial motions, counsel cannot be permitted to raise motions at other proceedings to avoid the procedural requirements of the omnibus hearing. Therefore the failure to raise motions which are available at the hearing must be considered a waiver except in extraordinary circumstances. An extraordinary circumstance may be dem-

91. The test for allowing the presentation of motions at trial is discussed in the text following note 94 *infra*. Generally, extraordinary circumstances are required for the motions to be allowed at trial. At the omnibus hearing a test requiring only an unforeseeable necessity in order to permit the oral motion may be a sufficient standard.

92. *Symposium, supra* note 26, at 380.

93. *Symposium, supra* note 26, at 380-381.

94. "This [waiver] provision is a critical part of the procedural design of this report, which has as a pervasive purpose . . . the reduction of unnecessary and repetitious hearings and trials." 1 CRIMINAL PROCEDURE SOURCEBOOK 455 (B. George, Jr., ed. 1970).

onstrated during a later proceeding when a motion is required due to previously unknown facts or circumstances. In the event of such an occurrence the judge will have discretion to ignore the implied waiver.

There is a statutory precedent for this implied waiver and discretion to disregard it. Penal Code Section 1538.5(h) provides this type of discretion as follows:

> If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

Recent decisions of the California Supreme Court and the courts of appeal have enforced the implied waiver upon the finding that the trial judge correctly refused to allow a 1538.5 motion at trial since counsel did not raise the issue prior to trial.[95]

No doubt this discretion in the trial judge would give him power which could negate one of the primary objectives of the omnibus hearing: the termination of dilatory tactics by counsel through the use of pretrial and trial motions. In *People v. Richardson*[96] the court reinforced the concept that the discretion of the judge to permit a 1538.5 motion at trial must be carefully controlled: "[T]he in-trial motion no doubt was under the sanction of section 1538.5. . . . This discretion [of the court to entertain the motion] is to be exercised sparingly and under narrowly drawn conditions."[97]

In support of such implied waiver clauses,[98] the United States Supreme Court has stated that, although state procedures cannot be used to defeat constitutional rights, if procedural rules serve a legitimate state interest the defendant may be estopped to raise these rights at a later proceeding.[99] The basic standard is

> where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate non-federal ground in the vast majority of cases.[100]

---

95. People v. Richardson, 6 Cal. App. 3d 70, 85 Cal. Rptr. 607 (1970). *See also* People v. O'Brien, 71 Cal. 2d 394, 456 P.2d 969, 79 Cal. Rptr. 313 (1969); People v. Werber, 19 Cal. App. 3d 598, 97 Cal. Rptr. 150 (1971).

96. 6 Cal. App. 3d 70, 85 Cal. Rptr. 607 (1970).

97. *Id.* at 72 n. 2, 85 Cal. Rptr. at 609 n. 2.

98. For a brief review of legislative and judicial history of §1538.5(h) see People v. Superior Court of Kern Co., 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972); People v. Superior Court of Butte Co., 4 Cal. 3d 605, 483 P.2d 1202, 94 Cal. Rptr. 250 (1971).

99. Henry v. Mississippi, 379 U.S. 443, 447 (1965).

100. *Id.* at 448 n.3.

The key to such waiver clauses is the fact that the defendant has knowingly waived his opportunity to raise the available issues.[101] A concise statement in the statute reflecting the presumption of waiver and its effect should satisfy this requirement.

3. *Immediate appellate review upon request by either the state or the defense*

The granting of appellate review for the state and the defense is one of the more hotly contested issues involved in omnibus hearing proposals. The ABA proposal does not include this form of appellate review[102] whereas the recent California legislative proposals have all included a provision for review.[103] Senate Bill 649 (1972 Regular Session) originally provided for appellate review of all decisions adverse to the state but precluded the defense from the same immediate review. Subsequent amendments in the senate and the assembly included review for both parties.[104]

Currently the state has almost no right of appellate review of an adverse decision on a pretrial motion except as provided in Penal Code Sections 1238,[105] 1466[106] and 1538.5.[107] Essentially these sections preclude state appellate review of a pretrial motion unless the motion involves the area of search and seizure or the decision dismisses the action before the defendant is placed in jeopardy. In contrast, the defendant is granted the same rights as the state in the area of search and seizure[108] plus the guarantee that *all* motions denied may be reviewed upon a final judgment of conviction.[109] It is not difficult to envision the reaction of defense lawyers if the privilege of immediate appellate review of all pretrial motions is extended to both the state and the defense. The eventual outcome of a political battle to include such a provision is difficult to predict. In the abstract, however, the logic of immediate appellate review is appealing. The prosecution would have the potential to correct erroneous decisions before jeopardy attaches while the defense could petition for redress of an incorrect decision immediately, precluding in some cases the ordeal of trial and in other cases conviction with subsequent reversal.

Analysis of similar provisions in Section 1538.5 should be indica-

101. Fay v. Noia, 372 U.S. 391, 439 (1962).
102. ABA MODEL CODE 20-21, Supp. 6-7.
103. Recent proposals listed note 54 *supra*.
104. S.B. 649, 1972 Regular Session, *as amended*, July 6, 1972.
105. CAL. PEN. CODE §1238(1)-(3).
106. CAL. PEN. CODE §1466(1)(a)-(e).
107. CAL. PEN. CODE §1538.5(o).
108. CAL. PEN. CODE §1538.5(i),(o).
109. CAL. PEN. CODE §§1237, 1237.5, 1466(2)(a).

tive of the potential of this type of section in the omnibus hearing. During the 1971-72 fiscal year a total of 396 petitions were filed in relation to adverse decisions concerning 1538.5 motions in intermediate California appellate courts. Three hundred and seventy-four (94%) were filed by the defense and 22 (6%) were filed by the state. Of the 37 petitions eventually granted by the court the defense obtained 25 (7% of the number for which review was requested) and the state was granted 12 (57% of the number for which review was requested). Although hardly conclusive data, it does seem to indicate a restraint by both parties in requesting an appeal from the 1538.5 hearing since literally thousands of these hearings were conducted in the same fiscal year.[110] The comparative success of the state must be tempered somewhat by the fact that the state can afford to select only those cases likely to be successfully challenged. The defendant, on the other hand, must appeal if there is a reasonable chance of reversal. Nevertheless, the percentage of successful appeals by the state does reveal an impressive degree of restraint in appealing only the most obvious cases of apparent error.

One argument against extending the right of appellate review is that the courts of appeal would be burdened with more appeals.[111] One solution would be to adopt the ABA recommendation and not permit pretrial review. There are some strong objections to such a recommendation, however. The state is precluded from any appellate review even in the face of a patently erroneous decision. The defendant is similarly precluded from appealing until the entire trial is concluded. There is also the possibility that no final adjudication of the motion will be made in cases terminated on other grounds. In any event, this element of the omnibus hearing will probably continue to be a source of significant controversy no matter which form is finally adopted.

4. A firm timetable for the hearing and appellate review

In order to fulfill one of the hearing's stated objectives—efficient adjudication of pretrial motions[112]—the omnibus hearing must have a firm timetable for both the hearing and subsequent appellate review. In the absence of such, the hearing could take on many of the deficiencies of the present system: continuances, postponement of the trial, and

110. Report prepared by the Administrative Office of the Courts from special data submitted by the Capital Courts of Appeal (Sept. 20, 1972).

111. Many issues raised at the omnibus hearings have caused judges to make more rulings causing the aggrieved party to appeal. . . . This will cause the district court of appeals to be flooded and will again delay, not expedite, the final trial of the case.

Hearings on the Omnibus Pre-Trial Hearing 76.

112. See text accompanying note 28 *supra*.

other delays. A balance must be struck between the need for adequate preparation and the desire for rapid termination of the pretrial proceedings. The basic problem is to determine a timetable which neither prematurely brings the issues before the court nor unnecessarily delays the constitutional guarantee of a speedy trial. Additionally, the court should grant a continuance whenever special circumstances appear to require it. However, it is obvious that this discretion will have to be exercised sparingly or the objectives of an omnibus hearing will be defeated.

A caveat must be introduced at this point. In many of the articles regarding the feasibility of an omnibus hearing the comment has been made that discovery must be substantially complete when the hearing is held.[113] The rationale seems obvious. Without knowledge of the evidence to be presented by the state, the defense counsel cannot make effective or intelligent motions nor can he waive motions which would become evident when discovery is complete. Fortunately, in California the extent of permissible discovery, although by no means settled, has developed to such a degree that the defense is readily permitted access to prosecution evidence in a majority of cases.[114] In fact, California is often credited as being a leader in this particular area of criminal law.[115] Therefore the ordinary case should not involve significant problems if the date for a hearing were set shortly after arraignment or preliminary hearing.

In order to prevent any difficulties from a lack of discovery, any pertinent problems should be subject to review at the hearing itself.[116] This would permit the defense (and in a more limited manner, the state) to raise questions involving the degree of discovery given to his side by opposing counsel.[117] As indicated earlier, this is crucial to the entire presentation of pretrial motions. If discovery cannot be completed at that time, the hearing must be continued. Any exceptions to completed discovery at the hearing would be covered through the exercise of judicial discretion to permit motions at subsequent proceedings (*e.g.*, the trial) upon a showing of newly discovered material.[118]

There does not appear to be much of a problem with establishing a

113. 1 CRIMINAL PROCEDURE SOURCEBOOK 450-54 (B. George, Jr., ed. 1970).
114. D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY 848 (2d ed. 1972).
115. Barbara, *Pre-trial Discovery in Criminal Cases—A Case for Discovery in Kansas*, 9 WASHBURN L.J. 211, 216 (1970).
116. 1 *Criminal Procedure Sourcebook* 454 (B. George, Jr., ed. 1970).
117. However, there may be disagreements between counsel as to what disclosures are required or the prosecution may need a protective order. . . . A variety of matters need attention under the discovery standards . . . all such discovery matters should be settled at the Omnibus Hearing . . . . *Id.*
118. See text accompanying notes 94-96 *supra.*

relatively brief time span for requesting appellate review. One recent proposal, Senate Bill 649 (1972 Regular Session), provided for the hearing to be held within 10 to 20 days after the arraignment of the defendant and entry of a request for appellate review within 30 days after receipt of transcript of the hearing.

5. *A permanent record of the hearing, made and released to both counsel within a reasonable time*

The requirement that a permanent record be made is almost self-explanatory. Since later proceedings will base the permission or denial to make further motions in part on the record from the omnibus hearing, a transcript or summation of the proceedings is mandatory. The ABA proposal originally called for a verbatim transcript to be made[119] but in the final draft recommended that only a summary of the proceeding be required.[120] In contrast, Senate Bill 649 required a transcript of the hearing to be made in all cases when either party requests a review of any of the decisions made at the hearing. The verbatim report seems to have significant advantages over the summary report. No doubt many of the questions raised at the review will involve precise legal issues. In the absence of the actual conversations at the hearing, the appellate court judges will not be given a full analysis of the development of the arguments of opposing counsel concerning the particular motion.

In the criminal pre-trial motion field a verbatim transcript can be especially critical. For example, in a motion for change of venue the defense counsel should outline in some detail the particular difficulties the local district presents in securing a fair trial for his defendant. A mere summary of his arguments might slight the one crucial point that would reverse the denial of such a motion. In brief, the time and effort saved by a summary could prove insignificant in relation to the danger of insufficient protection of the defendant's rights.

CONCLUSION

The greatest potential of the omnibus hearing is that both justice and efficiency can be served. The two goals need not be mutually exclusive. In the words of Chief Justice Burger, "Efficiency must never be the controlling test of criminal justice, but the work of the courts can be efficient without jeopardizing basic safeguards."[121] The omni-

119. ABA MODEL CODE 21.
120. ABA MODEL CODE supp. 7.
121. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 932 (1970).

bus hearing in California would eliminate some of the confusion surrounding pretrial motions. The result should be a welcome return to an emphasis on the substantive issues. At the very least, an omnibus pretrial hearing in California would present a logical and uniform vehicle for the resolution of pretrial motions in criminal cases.

James F. Geary