CHAPTER 45
FIRST APPEARANCE: PRELIMINARY EXAMINATION

§ 45.10. Duty to Delivery Arrestee to Judge, or to Peace Officer.

(a) An officer making an arrest under a warrant or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a judge of the Superior Court.

(b) Notwithstanding Subsection (a), a private person who has arrested another for the commission of an offense, may deliver him to a peace officer who shall take the person arrested before the judge.

(c) The person arrested *shall* in all cases be taken before the judge within forty-eight (48) hours after the arrest, *except* that when the forty-eight (48) hour period expires, it is the burden of the government to demonstrate that a bona fide emergency *or* an extraordinary circumstance existed.

SOURCE: Subsection (c) amended by P.L. 29-075:1 (May 9, 2008).

NOTE: Section 45.10 is based on the first sentence of former Rule 5 and portions of former §§ 825 and 847 - 849. See also former §§ 821-824. It should be noted that although Subsection (c) sets a maximum time period, the basic test in all cases requires no unnecessary delay. See generally B. Witkin, California Criminal Procedure Proceedings Before Trial §§ 114,117 (1963, Supp. 1973). It should also be noted that this Section does not apply where the arrested person is released pursuant to either §§ 20.60 or 25.10.

§ 45.20. Complaint to be Filed; When.

(a) Where a person is arrested without a warrant, at or before the time he is brought before the court pursuant to § 45.10, the prosecuting attorney

shall file a complaint which satisfies the requirements of § 15.10 and affidavits showing probable cause to believe that an offense has been committed and that the defendant has committed it.

(b) At or before the time of the defendant's first appearance pursuant to § 45.30, if no determination has previously been made by the court or grand jury that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the court shall make such determination in the manner provided by §§ 15.20 and 15.30. The defendant shall have no right to be present at any hearing leading to such determination. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the court shall dismiss the complaint and discharge the defendant. Such discharge shall not preclude the government from instituting a subsequent prosecution for the same offense.

NOTE: Subsection (a) of § 45.20 is substantively the same as the second sentence of former Rule 5(a). See also Rule 5 of the Federal Rules of Criminal Procedure. Compare former § 849. Subsection (b) is added to satisfy the requirement of a judicial determination of probable cause set forth in *Gerstein v. Pugh,* 420 U.S. 103 (1975). The subsection makes clear that the defendant has no right of confrontation or cross-examination at this stage of the proceeding. For all practical purposes the procedure is the same as that for determining whether a warrant or summons should issue but occurs after arrest rather than before. This procedure does not, however, obviate the need for an indictment or preliminary examination in felony cases.

§ 45.30. First Appearance; Statement by Court; Public Defender Allowed.

(a) At the time the defendant is brought before the court pursuant to § 45.10 or appears pursuant to a summons issued pursuant to Chapter 15 (commencing with § 15.10) or a notice to appear pursuant to § 25.20, the court shall inform the defendant;

(1) of the complaint against him and of any affidavits filed therewith.

(2) of his right to retain counsel.

(3) of his right to request the assignment of counsel if he is unable to obtain counsel.

(4) of the general circumstances under which he may secure his pretrial release.

(5) of his right to prosecution by indictment, where such right is

available.

(6) of his right to a preliminary examination, where such right is available.

(7) that he is not required to make a statement and that any statement made by him may be used against him.

(b) If the defendant appears without counsel, the court shall ask him if he desires the assistance of counsel. If he desires counsel, the court shall inquire of him whether he is financially able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him at his own expense. If he desires assignment of counsel, the court shall make such assignment. The court shall assign counsel at public expense if the defendant desires counsel and is financially unable to employ counsel.

(c) The defendant shall not be called upon to plead, shall be allowed reasonable time and opportunity to obtain and consult with counsel, and shall be released in the manner and subject to the conditions provided by Chapter 40 (commencing with § 40.10).

NOTE: Section 45.30 is based on the first Paragraph of Rule 5(c) of the Federal Rules of Criminal Procedure (as revised in 1972) and portions of former Rules 5 and 44 and former §§ 858-860. See also former § 987. See generally 8 Moore, Federal Practice § 5.03 (2d ed. 1974).

§ 45.40. Procedure When Public Defender Cannot Serve.

In any criminal action in which a defendant is entitled to be represented by counsel at public expense and the court finds that because of conflict of interest or other reason that the public defender has properly refused to represent the defendant, the court shall appoint private counsel for the defendant and order that counsel receive a reasonable sum for compensation and necessary expenses to be paid by the Treasurer of the Territory.

NOTE: Section 45.40 supersedes a portion of former § 859.

§ 45.45. Waiver of Indictment; of Preliminary Examination.

In any case where the defendant has the right to prosecution by indictment, he may waive such right at any time after he has been advised of his rights pursuant to § 45.30. If the defendant has also waived his right to a preliminary examination, upon waiver of prosecution by indictment, the court shall hold the defendant to answer, and shall order the prosecuting

attorney to file, within fifteen days after entry of the order, an information in the court charging the defendant with the offense charged by the complaint.

NOTE: Section 45.45 provides the procedure for waiver by the defendant of prosecution by indictment contemplated by § 1.15. Compare former § 682(b); former Rule 7(b). It should be noted that the defendant may waive both prosecution by indictment pursuant to this Section and a preliminary examination pursuant to § 45.50(f), in which case, the court will order an information to be filed. If the defendant waives only his right to an indictment, then he is not deprived of his right to a preliminary examination, unless the prosecuting attorney opts to obtain an indictment. See §§ 1.15; 45.50(d). For dismissal for failure to file an information within the time prescribed, see § 80.60.

§ 45.50. Preliminary Examination: Date; Purpose; None Required When Indictment Precedes.

(a) Except as otherwise provided by this Section and § 45.45, in every case where a preliminary examination is required by §§ 1.15 and 1.17, such examination shall be held within the time set by the court pursuant to Subsection (b) to determine whether there is probable cause to believe that an offense has been committed and that the defendant has committed it.

(b) The date for the preliminary examination shall be fixed by the court at the first appearance of the defendant. Such examination shall be held within a reasonable time following the first appearance, but in any event not later than:

(1) the tenth day following the date of the first appearance of the defendant before such court if the defendant is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the first appearance if the defendant is released form custody under any condition other than a condition described in Paragraph (1).

(c) Notwithstanding Subsection (b), with the consent of the defendant, the date fixed by the court for the preliminary examination may be a date later than that prescribed by Subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent the date fixed for the preliminary examination may be a date later than that prescribed by Subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order

of the court after a finding the extraordinary circumstances exist, and that the delay of the preliminary examination is indispensable to the interest of justice.

(d) Except as provided by Subsections (e) and (f), a defendant who has not been accorded the preliminary examination required by Subsection (a) within the period of time fixed by the court in compliance with Subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with Subsection (a) shall be required to be accorded a defendant, nor shall such defendant be discharged from custody or from the requirement of bail or any other condition or release pursuant to Subsection (d), if at any time prior to the first appearance of such person before the court or subsequent to the first appearance but prior to the date fixed for the preliminary examination pursuant to Subsections (b) and (c) an indictment is returned against him.

(f) The defendant may waive the preliminary examination at any time after he has been advised of his rights pursuant to § 45.30 and upon such waiver the court shall hold the defendant to answer, and shall order the prosecuting attorney to file, within fifteen days after entry of the order, an information in the court charging the defendant with the offense charged by the complaint.

NOTE: Section 45.50 is based on 18 U.S.C.A. § 3060 (1974). See also the second paragraph of Rule 5(c) of the Federal Rules of Criminal Procedure (as revised in 1972) and portions of former Rule 5 and former §§ 860, 861 and 872. See generally 8 Moore, Federal Practice § 5.03 (2d ed. 1974). It should be noted, however, that under the procedures provided by this Code, in felony cases only the return of an indictment, not the filing of an information, obviates the need for a preliminary examination. See B. Witkin, California Criminal Procedure Proceedings Before Trial § 132 (1963, Supp. 1973). An indictment may, of course, be returned before the defendant even makes his first appearance in which case, no right to a preliminary examination exists and one will never be scheduled. See Subsection (e).

Subsection (f) is based on Subdivision (D) of former § 860. See also former § 872. It should be noted, however, that where a preliminary examination is waived, there is no provision in this section or elsewhere for holding an examination despite the waiver. For dismissal for failure to file within the time prescribed, see § 80.60.

§ 45.60. Preliminary Examination: Procedure.

(a) At the preliminary examination, the court shall take evidence in the

same manner as at trial. Witnesses shall be examined in the presence of the defendant. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to the admissibility of evidence may be taken on any grounds that would be available at trial.

(b) While a witness is under examination, the court may exclude all witnesses who have not been examined. The court may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.

(c) The court shall, upon the request of the defendant, exclude from the examination every person except the court clerk, the court reporter, the court bailiff, a witness while he is testifying, the prosecuting attorney, the investigating officer, the defendant and his counsel, the officer, if any, having the defendant in custody and the officer having custody of a prisoner while the prisoner is testifying. Nothing in this Subsection shall affect the right to exclude witnesses as provided in Subsection (b).

(d) Notwithstanding Subsection (c), when the witness who is testifying is a person less than 18 years old, the witness shall be entitled to have an adult of the same sex in the courtroom.

NOTE: Section 45.60 is based on former §§ 865-868. See also former Rule 5(c). It should be noted that the last sentence of Subsection (a) marks a significant departure from federal procedure. Under Subsection (a) objections may be taken to evidence on the grounds that it is hearsay or that it was acquired by unlawful means. The new provision is consistent with the California law, see *People v. Davidson,* 227 C.A. 2d 331, 38 Cal. Rptr. 660 (1964), but in direct contrast to Rule 5.1 of the Federal Rules of Criminal Procedure.

Subsections (b) and (c) are based on former §§ 867 and 868 respectively. Their California counterparts are discussed in B. Witkin, California Criminal Procedure Proceedings Before Trial §§ 140-143 (1963, Supp. 1973).

§ 45.70. Preliminary Examination to be Recorded; Accessibility.

(a) The preliminary examination shall be either recorded by suitable sound recording equipment or taken down by a court reporter.

(b) The court, upon timely application and such terms and conditions as it may require, shall give the attorney for the defendant and the prosecuting attorney an opportunity to examine any recording of the preliminary examination for their information in connection with any further hearing or their preparation for trial and shall order a transcript make of all or part of such proceedings. Such transcript shall be furnished without cost to the party requesting it.

NOTE: Section 45.70 is based on 18 U.S.C.A. § 3060(f) and Rule 5.1(c) of the Federal Rules of Criminal Procedure. Compare former §§ 860, 869-870 makes clear that a complete record of the preliminary examination must always be made and, where needed in subsequent proceedings must be furnished to both the prosecution and the defense. Section 45.70 does not require a transcript in every case because in some cases no probable cause will be found and the complaint will be dismissed and the defendant discharged. See § 45.80. However, even in such cases, a recording will have been made and if a new charge is made in subsequent proceedings, the parties may still need and are authorized to obtain the record or a transcript of the prior proceeding.

§ 45.80. Procedure Where Probable Cause Shown; Not Shown.

(a) If from the evidence taken at the preliminary examination, it appears that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the court shall hold the defendant to answer and shall order the prosecuting attorney to file, within fifteen days after entry of the order, an information in the court charging the defendant with the offense shown.

(b) If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the court shall dismiss the complaint and discharge the defendant. Such discharge shall not preclude the government from instituting a subsequent prosecution for the same offense.

NOTE: Section 45.80 is based on portions of former Rule 5(c) and former §§ 809, 860 and 871-872. See also Fed. R. Crim. P. 5.1(a), (b). See generally B. Witkin, California Criminal Procedure Proceedings Before Trial §§ 144-146 (1963, Supp. 1973). The court's order will state the offense (offenses) which may be charged in the information. These will be all the offenses for which probable cause has been shown. As to the form of the information, see § 55.10. For dismissal for failure to file within the time prescribed, see § 80.60. If probable cause has not been shown, the complaint must be dismissed and the defendant discharged; however, Subsection (b) makes clear that such dismissal does not prejudice a new filing on the basis of new evidence.
