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# Codifying the Status Quo: Chapter 18 Admits Retired Officers' Hearsay Testimony at Preliminary Hearings

*Breann Marie Handley*

## *Code Section Affected*

Penal Code Section § 872 (amended).

AB 557 (Karnette); 2005 STAT. Ch. 18.

## I. INTRODUCTION

While most families gathered for Thanksgiving in 1994, Downey City police officers searched for Luz Maria Nucino and her two daughters, Gabriela and Edith Gonzalez.<sup>1</sup> Officers, such as Sergeant James Elsasser, suspected that the children's step-father, Estanislao Gonzalez, played a role in their disappearance; however, the officers lacked sufficient evidence to make an arrest.<sup>2</sup> The case went cold.<sup>3</sup>

In 2003, DNA tests revealed that blood spatter found on Estanislao Gonzalez's apartment walls came from three individuals.<sup>4</sup> Further DNA tests of the blood revealed a mother-daughter relationship between the donors.<sup>5</sup> In May of 2003, officers arrested Estanislao Gonzalez; however, none of the witnesses from 1994 were able to testify at the preliminary hearing.<sup>6</sup> The district attorneys working on the case doubted their ability to prove probable cause<sup>7</sup> without evidence from the original investigation.<sup>8</sup>

In 1990, California voters passed Proposition 115, which gives district attorneys a powerful tool to overcome the dilemma the Los Angeles District Attorneys faced.<sup>9</sup> Specifically, Proposition 115 enacted California Penal Code section 872 ("section 872"),<sup>10</sup> which creates a hearsay exception that allows an

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1. Telephone Interview with John Finch, Chief, Downey Police Dep't (June 22, 2005) (notes on file with the *McGeorge Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*; see also BLACK'S LAW DICTIONARY 1199 (7th ed. 1999) ("[A preliminary hearing is a] criminal hearing ([usually] conducted by a magistrate) to determine whether there is sufficient evidence to prosecute an accused person. If sufficient evidence exists, the case will be set for trial . . ."); CAL. PENAL CODE § 866(b) (West Supp. 2005) ("[T]he purpose of a preliminary examination [is] to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery.").

7. See BLACK'S LAW DICTIONARY 1219 (7th ed. 1999) (defining probable cause as "[a] reasonable ground to suspect that a person has committed . . . a crime[,] . . . [it] amounts to more than a bare suspicion but is less than evidence that would justify a conviction . . .").

8. Telephone Interview with John Finch, *supra* note 1.

9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 2 (Apr. 5, 2005).

10. CAL. PENAL CODE § 872 (amended by Chapter 18).

investigating officer to testify about witnesses' statements to support a finding of probable cause at a preliminary hearing.<sup>11</sup>

If Sergeant Elsasser could testify about the original witnesses' statements at the preliminary hearing, the district attorney could "bridge" the original investigation with the current one, thus proving probable cause.<sup>12</sup> However, Sergeant Elsasser had since retired and the commissioner presiding over Gonzalez's preliminary hearing declined to apply section 872's exception to Sergeant Elsasser's hearsay testimony because the section applied only to "active" officers.<sup>13</sup> In a creative attempt to come within the scope of section 872, the district attorney had the Chief of Police reinstate Sergeant Elsasser as a reserve officer, thus qualifying him to testify as an "active" officer under section 872.<sup>14</sup>

After the commissioner found probable cause at the preliminary hearing,<sup>15</sup> Estanislao Gonzalez pled guilty and disclosed the location in Las Vegas where he had discarded his victims.<sup>16</sup> Investigators matched the mother's and her daughters' DNA with the DNA of the three Jane Does found at that location in 1996.<sup>17</sup>

While the district attorney prevailed in that case, not all attempts to bring retired officers within the requirements of section 872 have been successful.<sup>18</sup> To address cases when reinstating retired officers is not feasible, and to prevent the need for procedural inconveniences, the California Legislature enacted Chapter 18 to bring retired officers' hearsay testimony within section 872's admissibility exception.<sup>19</sup>

## II. LEGAL BACKGROUND

### A. *Paving the Way: Proposition 115*

In June of 1990, California voters implemented a broad range of changes to California's criminal procedure system with Proposition 115,<sup>20</sup> also known as the

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11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 2 (Apr. 5, 2005).

12. Telephone Interview with John Finch, *supra* note 1.

13. *Id.*

14. Telephone Interview with Jack Horvath, Captain, Bureau of Investigation, Spec. Operations, L.A. County Dist. Att'y's Office (June 10, 2005) (notes on file with the *McGeorge Law Review*).

15. See Telephone Interview with John Finch, *supra* note 1 (indicating the case was *People v. Gonzalez*, Case No. VA076338 (Downey Super. Ct. Mar. 2004)).

16. *Id.*

17. *Id.*

18. Telephone Interview with Jack Horvath, *supra* note 14.

19. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 2 (Apr. 5, 2005).

20. See *Raven v. Deukmejian*, 52 Cal. 3d 336, 342-46, 801 P.2d 1077, 1080-83 (1990) (highlighting Proposition 115's major changes, including changes to laws addressing postindictment preliminary hearings; independent construction of state constitutional criminal rights; due process and speedy, public trials; joinder and severance of cases; hearsay testimony at preliminary hearings; discovery procedures; voir dire; felony-murder, special circumstances, and torture statutes; appointment of counsel; trial dates and continuances; and

“Crime Victims Justice Reform Act.”<sup>21</sup> Fifty prosecutors wrote Proposition 115, which amended the California Constitution, repealed and added sections to the California Code of Civil Procedure, added a section to the California Evidence Code, and amended, repealed, and added sections to the California Penal Code.<sup>22</sup> Section 18 of Proposition 115 amended Penal Code section 872(b) to constitutionally<sup>23</sup> allow a finding of probable cause at a preliminary hearing<sup>24</sup> based “in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted.”<sup>25</sup>

Prior to Proposition 115, if a witness was unable to testify at a preliminary hearing, the witness’s statements were inadmissible unless the witness sent a sworn written statement in lieu of testimony. However, a sworn written statement in lieu of testimony was insufficient if the witness was a victim.<sup>26</sup> Thus, when a victim’s testimony was essential to prove probable cause, the victim had to testify at the preliminary hearing or a district attorney could not proceed. Overall, section 872 significantly changed preliminary hearings in California<sup>27</sup> because it allows an officer to testify about statements<sup>28</sup> by any witness,<sup>29</sup> including victims, who are not competent or available to testify at the preliminary hearing.<sup>30</sup> Accordingly, proponents of section 872 explain that it prevents defense attorneys from “intentionally badgering victims”<sup>31</sup> and relieves victims from enduring the

Legislative amendments).

21. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 2, 5 (Apr. 5, 2005).

22. Ballot Pamphlet, Proposed Amendments to Cal. Const. with Arguments to Voters, Gen. Elec., at 9 (June 5, 1990) [hereinafter Proposition 115 Ballot Initiative] (on file with the *McGeorge Law Review*).

23. See CAL. CONST. art. I, § 30, cl. b (“In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process.”).

24. See *supra* notes 6-7 and accompanying text.

25. See Proposition 115 Ballot Initiative, *supra* note 22, at 18-19 (“Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and identifying testifying hearings.”).

26. *Id.* at 8-9.

27. *Martin v. Super. Ct.*, 230 Cal. App. 3d 1192, 1195, 281 Cal. Rptr. 682, 684 (1991) (“The initiative measure significantly has changed the California preliminary hearing procedure.”).

28. See CAL. EVID. CODE § 1200 (West 1995) (“[Hearsay is] evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible.”).

29. Proposition 115 Ballot Initiative, *supra* note 22 at 18-19.

30. See *People v. Daily*, 49 Cal. App. 4th 543, 551-52, 56 Cal. Rptr. 2d 787, 792 (1996) (holding that section 872 does not require a “child molestation victim to be qualified to testify at a preliminary hearing in order for the minor’s hearsay declarations to be admissible” because section 872 does not require that the hearsay declarant be competent to testify).

31. Interview with Dan Felizzatto, Legis. Advoc., L.A. Dist. Att’y’s Office, in Sacramento, Cal. (June 8, 2005) (notes on file with the *McGeorge Law Review*).

traumatic experience of testifying more than is necessary.<sup>32</sup> Courts have also upheld the use of section 872 to admit an officer's testimony about the out-of-court statements of an expert witness<sup>33</sup> or a defendant's accomplice.<sup>34</sup>

### B. Refining the Path: Constitutional Attack and an Undefined Term

Since it was first codified, section 872 has faced and withstood a number of constitutional attacks.<sup>35</sup> Most notably, in *Whitman v. Superior Court of Santa Clara County*, the California Supreme Court held that section 872 does not violate a defendant's Sixth Amendment right to confront adverse witnesses.<sup>36</sup> The court determined the Confrontation Clause does not create an absolute bar to hearsay evidence or procedures that "may limit or preclude a direct face-to-face confrontation between accused and accuser."<sup>37</sup> Additionally, while California Evidence Code section 1203 allows a defendant to cross-examine a declarant of a hearsay statement,<sup>38</sup> Proposition 115 enacted section 1203.1, which makes section 1203 inapplicable to a hearsay statement admitted under section 872.<sup>39</sup>

Still, to ensure section 872's constitutionality, the *Whitman* court underscored and refined its safeguards.<sup>40</sup> First, a testifying officer cannot be a mere "reader," but must have been an actual investigating officer with "sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement."<sup>41</sup> Second, "the experience and training requirements of the section"<sup>42</sup> help assure that the hearsay testimony of the investigating officer will indeed be as reliable as appropriate in light of the limited purpose of the

32. *Id.*

33. See *Hosek v. Super. Ct.*, 10 Cal. App. 4th 605, 609, 12 Cal. Rptr. 2d 650, 652 (1992) (declining "to exclude expert witnesses from the scope of 'declarants' under section 872").

34. *People v. Miranda*, 23 Cal. 4th 340, 351, 1 P.3d 73, 79 (2000).

35. See *Raven v. Deukmejian*, 52 Cal. 3d 336, 355, 801 P.2d 1077, 1089 (1990) (holding that Proposition 115 satisfies the "single-subject rule"); see also *Whitman v. Super. Ct.*, 54 Cal. 3d 1063, 1077-78, 820 P.2d 262, 269-70 (1991) (holding section 872 does not violate the Confrontation Clause).

36. *Whitman*, 54 Cal. 3d 1063, 820 P.2d 262; see generally U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

37. *Whitman*, 54 Cal. 3d at 1077-78, 820 P.2d at 269-70 (citing, for example, *Idaho v. Wright*, 497 U.S. 805 (1990) (admitting, at trial, hearsay statements by child victims of sexual abuse) and *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980) (admitting, at trial, hearsay statements if reliability of testimony and unavailability of declarant are shown)).

38. CAL. EVID. CODE § 1203 (West 1995).

39. *Id.* § 1203.1.

40. *Whitman*, 54 Cal. 3d at 1078, 820 P.2d at 270.

41. See *id.* at 1068, 820 P.2d at 264 (concluding the lower court erred in not granting the defendant's motion to dismiss charges because the lower court's finding of probable cause was wrongly based on the hearsay testimony of a "noninvestigating officer lacking any personal knowledge of the case, [thus] was insufficient and incompetent to constitute probable cause . . .").

42. See *infra* note 68 and accompanying text.

preliminary hearing.”<sup>43</sup> Lastly, the defendant’s ability to cross-examine the investigating officer “provides sufficient basis for a pretrial probable cause determination.”<sup>44</sup>

While section 872 established the training or experience required for testifying officers, it did not provide a definition of “law enforcement officer.”<sup>45</sup> In addressing this issue, the California Fifth Appellate District held that a “peace officer” under section 830.37, subdivision (a)-(b),<sup>46</sup> falls within section 872’s definition of a “law enforcement officer.”<sup>47</sup> Based on this definition, the court allowed an arson investigator who had interviewed a victim and witnesses to testify about their statements under section 872.<sup>48</sup> Two years later, the California Second Appellate District held that a Franchise Tax Board investigator could testify under section 872.<sup>49</sup> The Second Appellate District Court emphasized that, even though the Franchise Tax Board investigator was not traditionally or statutorily a peace officer, the “critical inquiry is whether [his] qualifications and duties are commensurate with those individuals upon whom the Legislature has, for whatever reason, conferred ‘peace officer’ status.”<sup>50</sup> Ultimately, the court concluded that “an investigating agent or officer employed by a state, federal or local agency, whose primary duty is to enforce the laws administered by that agency, and who otherwise meets the foundational qualifications of section 872,<sup>51</sup> . . . may offer hearsay testimony at a preliminary hearing.”<sup>52</sup> Lastly, when faced with the same issue, the California Fourth Appellate District concluded that section 872 encompassed a prison correctional officer because the correctional officer was able to “meaningfully assist the magistrate in assessing the reliability of the [declarant’s] statement.”<sup>53</sup>

### C. *Mending a Gap: Chapter 18*

Although section 872 withstood constitutional attack, a gap in the legislation became apparent.<sup>54</sup> Specifically, district attorneys encountered a stumbling block

43. *Whitman*, 54 Cal. 3d at 1078, 820 P.2d at 270; see *supra* notes 6-7 and accompanying text.

44. *Whitman*, 54 Cal. 3d at 1078, 820 P.2d at 270; see *supra* notes 6-7 and accompanying text.

45. See Proposition 115 Ballot Initiative, *supra* note 22, at 18-19 (lacking a definition of “law enforcement officer”).

46. CAL. PENAL CODE § 830.37(a)-(b) (West Supp. 2005) (defining “peace officers” as: “(a) Members of an arson-investigating unit, . . . of a fire department or fire protection agency . . . if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud . . . (b) . . . [or] if the primary duty of these peace officers . . . is the enforcement of laws relating to fire prevention or fire suppression”).

47. *Martin v. Super. Ct.*, 230 Cal. App. 3d 1192, 1195, 281 Cal. Rptr. 682, 684 (1991).

48. *Id.* at 1199, 281 Cal. Rptr. at 686.

49. *Sims v. Super. Ct.*, 18 Cal. App. 4th 463, 470, 22 Cal. Rptr. 2d 256, 260 (1993).

50. *Id.* at 469, 22 Cal. Rptr. 2d at 259.

51. See *infra* note 68 and accompanying text.

52. *Sims*, 18 Cal. App. 4th at 470, 22 Cal. Rptr. 2d at 260.

53. *People v. Silver*, 35 Cal. App. 4th 1023, 1024, 1027, 41 Cal. Rptr. 2d 379, 379, 381 (1995).

54. See Telephone Interview with Jack Horvath, *supra* note 14 (“Several of us thought of the idea, but I

when the officer they needed to testify at the preliminary hearing retired before the hearing.<sup>55</sup> In some situations, the retired officer's previous employer reinstated the officer for the purposes of the preliminary hearing;<sup>56</sup> however, reinstating officers was impractical in counties requiring compensation for reserve officers.<sup>57</sup> Further, some counties were concerned about the risk of liability if a reinstated officer was injured during the hearing.<sup>58</sup> In counties where retired officers could not be reinstated, an active officer could re-conduct the interviews the retired officer had conducted, thus allowing the active officer to testify.<sup>59</sup> Still, this avenue had the obvious result of repetitive and unproductive costs.<sup>60</sup>

In writing Chapter 18 as proposed legislation, Captain Jack Horvath felt "he was doing something good" for district attorneys, victims, witnesses, and others affected by the criminal process by making it "easier" to bring some suspects to trial.<sup>61</sup> For example, if a retired officer could not testify about witnesses' statements at a preliminary hearing for a complex fraud case, a district attorney could be forced to call twenty-five to thirty witnesses, many of whom could be out-of-state or the defendant's employees.<sup>62</sup> Additionally, based on advances in DNA research and criminal investigation, detectives have successfully solved cold cases; however, these detectives are often faced with deceased, forgetful, or missing witnesses.<sup>63</sup> In these cases, Chapter 18 allows the retired investigating officer, with the aid of his reports, to testify about victims' or witnesses' statements made during the original investigation.<sup>64</sup>

### III. CHAPTER 18

With Chapter 18, the California Legislature applied section 872's hearsay exception to honorably retired officers to solidify the purpose of section 872.<sup>65</sup> In doing so, Chapter 18 allows honorably retired officers to testify about a declarant's hearsay statements at a preliminary hearing.<sup>66</sup> Thus, just as a judge can consider an active officer's hearsay testimony in finding probable cause,

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was the one who prepared the proposal.").

55. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 2 (Apr. 5, 2005).

56. Interview with Dan Felizzatto, *supra* note 31.

57. Telephone Interview with Jack Horvath, *supra* note 14.

58. Interview with Dan Felizzatto, *supra* note 31.

59. Telephone Interview with Jack Horvath, *supra* note 14.

60. *Id.*

61. *Id.*

62. *Id.*

63. Interview with Kimberly Horiuchi, Counsel, Assembly Comm. on Pub. Safety, in Sacramento, Cal. (June 1, 2005) (notes on file with the *McGeorge Law Review*).

64. *Id.*

65. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 2 (Apr. 5, 2005).

66. *Id.* at 1.

Chapter 18 allows a judge to do so even if the officer has retired since taking the statements.<sup>67</sup>

Similar to the guidelines for active officers, Chapter 18 also requires that the testifying officer must have served for five years or completed an adequate training course prior to retiring.<sup>68</sup> Lastly, although neither Chapter 18 nor section 872 defines the term,<sup>69</sup> an honorably retired officer includes those who have qualified for and accepted a service retirement, but not those who accepted retirement in place of termination.<sup>70</sup>

#### IV. ANALYSIS OF CHAPTER 18

##### A. *Codifying an Existing Path*

Outside of the criminal justice system, Chapter 18 received little attention prior to its passage. For example, both legislative houses passed Chapter 18 on the consent calendar because it received no registered opposition or dissenting votes.<sup>71</sup> Moreover, while defense attorneys tended to oppose section 872,<sup>72</sup> they did not voice opposition against Chapter 18 because, prior to it, district attorneys were usually successful in finding loopholes to admit retired officers' hearsay testimony during preliminary hearings.<sup>73</sup> Thus, in almost all cases, Chapter 18 does not give district attorneys a new tool; it simply makes an existing tool more efficient.<sup>74</sup>

Specifically, instead of having to temporarily reinstate officers, Chapter 18 treats retired officers the same as active officers for purposes of the preliminary hearing.<sup>75</sup> Essentially, Chapter 18 removes the various procedures district

67. *Id.*

68. See CAL. PENAL CODE § 872 (amended by Chapter 18) (requiring that the training course must include "training in the investigation and reporting of cases and testifying at preliminary hearings" and be certified by the Commission on Peace Officers Standards and Training); see also *Hollowell v. Super. Ct.*, 3 Cal. App. 4th 391, 395, 4 Cal. Rptr. 2d 321, 323 (1992) (concluding a course by the Long Beach Police Department about hearsay testimony under Proposition 115 was not sufficient to qualify the officer to testify); *People v. Dawkins*, 10 Cal. App. 4th 565, 569, 12 Cal. Rptr. 2d 633, 635 (1992) (upholding an officer's testimony that he had taken a course certified by the Commission on Peace Officer Standards and Training as sufficient to qualify the officer under section 872).

69. See CAL. PENAL CODE § 872 (amended by Chapter 18) (lacking any definition of "honorably retired").

70. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 5 (Apr. 5, 2005) (defining "honorably retired").

71. Interview with Dan Felizzatto, *supra* note 31.

72. *Id.*

73. See *id.* (explaining that defense attorneys were losing objections to retired officers' hearsay testimony, especially when the police departments were reinstating the officers for the preliminary hearing).

74. See Legis. Proposal from Jack Horvath, Bureau of Investigations, Spec. Operations, to L.A. Dist. Att'y's Office, at 1 (Sept. 23, 2004) (on file with the *McGeorge Law Review*) ("Retired officers who cannot testify have been rehired on a per diem basis or sworn in as reserves. These processes handle the technical requirements of Prop 115, but truly do not change the qualifications of the previously retired officer.").

75. See Telephone Interview with Craig Datig, Chief Deputy Dist. Att'y, Riverside Dist. Att'y's Office

attorneys used to manipulate the technical requirements of section 872.<sup>76</sup> Moreover, as these procedures were meaningless because they did not “change the qualifications of the previously retired officer,” it is hard to criticize Chapter 18 for removing them.<sup>77</sup>

By streamlining the process, Chapter 18 potentially saves time and money for law enforcement, prosecutors, and the criminal justice system.<sup>78</sup> Similar to section 872 as originally enacted, Chapter 18 is also cost-efficient because it eliminates the burden of calling numerous witnesses for a preliminary hearing.<sup>79</sup> Instead, Chapter 18 allows a retired officer to testify about statements those witnesses made, thus often concluding a preliminary hearing within twenty-five to thirty minutes.<sup>80</sup>

Chapter 18 is also consistent with section 872’s intent.<sup>81</sup> As expressed in *Whitman*, the Legislature designed section 872 to have the investigating officer who took the witnesses’ statements relate them to the judge because that officer is uniquely qualified to assess the reliability and accuracy of the witnesses’ statements.<sup>82</sup> Accordingly, the retired officer who took those statements remains the “best choice” to convey them to the judge.<sup>83</sup> Letters supporting Chapter 18 explain that, if a retired officer’s hearsay testimony “uniquely adds to probable cause by the defendant, it would be an injustice not to [allow that officer to testify] just because [the] officer has since retired.”<sup>84</sup>

### A. *Unmended Gaps*

In reviewing Chapter 18 prior to its legislative submission, the Appellate Division of the Los Angeles County District Attorney’s Office recommended the bill include a definition of “honorably retired.”<sup>85</sup> Specifically, the Appellate Division suggested that Chapter 18 include the following: “As used in this section, the term ‘honorably retired’ includes all peace officers who have

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(June 14, 2005) (notes on file with the *McGeorge Law Review*) (characterizing Chapter 18 as “a common-sense application”).

76. Legis. Proposal from Jack Horvath, *supra* note 74, at 1.

77. *Id.*

78. Interview with Dan Felizzatto, *supra* note 31.

79. See Legis. Proposal from Jack Horvath, *supra* note 74, at 2 (predicting that “[s]ome savings of court time [will result] with the use of Prop 115 versus actual actual [sic] witness testimony”).

80. Interview with Dan Felizzatto, *supra* note 31.

81. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 2 (Apr. 5, 2005).

82. See Memorandum from L.A. Dist. Att’y’s Office, Appellate Div. (4-5911), to Curt Livesay, Chief Deputy Dist. Att’y, at 2 (Dec. 9, 2004) [hereinafter L.A. Dist. Att’y’s Office Memorandum] (on file with the *McGeorge Law Review*) (quoting *Whitman v. Super. Ct.*, 54 Cal. 3d 1063, 1074, 820 P.2d 262, 267 (1991)).

83. *Id.*

84. E.g., Letter from Timothy H. B. Yaryan, Legis. Counsel & Advocate, Assoc. for L.A. Deputy Sheriffs, Inc., to Betty Karnette, Assembly Member, Cal. State Assembly (Mar. 21, 2005) (on file with *McGeorge Law Review*).

85. L.A. Dist. Att’y’s Office Memorandum, *supra* note 82, at 4.

qualified for, and have accepted, a service or disability retirement.”<sup>86</sup> While that definition is essentially the same definition that was used in correspondence and committee analyses about Chapter 18,<sup>87</sup> the language is absent from the statute.<sup>88</sup> Moreover, California law enforcement agencies do not have a universally used definition of “honorably retired.”<sup>89</sup> While the lack of a definition could presumably lead to disputes or defense objections, the Legislative Advocate for the Los Angeles District Attorney’s Office believes it is “highly unlikely” that disputes will arise over the definition of “honorably retired.”<sup>90</sup> Ultimately, if such disputes do arise, the committee analyses serve as a strong indication of the definition the Legislature intended.<sup>91</sup>

In addition to omitting a definition, Chapter 18 also excludes possible situations that could create future obstacles. For example, if an investigating officer who is not qualified for retirement leaves the police department to enter a different profession, the former officer is neither active nor retired, thus could fall outside the parameters of section 872.<sup>92</sup> While the drafters probably could not predict every possible scenario, communications about Chapter 18 do not reflect discussion about whether other situations should be included.<sup>93</sup>

Although no opposition registered against Chapter 18, Proposition 115 and section 872 are not without their critics.<sup>94</sup> Further, as Chapter 18 broadens the scope

86. See *id.* at 3 (borrowing the definition from CAL. PENAL CODE § 12027 (West 2000)).

87. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 5 (Apr. 5, 2005) (“Honorably retired officers are those who have qualified for and accepted a service or disability retirement and not those who have accepted a service retirement in place of termination.”); see also Letter from Steve Cooley, Dist. Att’y, L.A. County Dist. Att’y’s Office, Sacramento Legis. Office, by James R. Provenza, Spec. Assistant Dist. Att’y, L.A. County Dist. Att’y’s Office, Sacramento Legis. Office, to Mark Leno, Chair, Assembly Pub. Safety Comm., at 1 (Mar. 16, 2005) (on file with the *McGeorge Law Review*) (“Honorably retired officers are those who have qualified for and accepted a service disability retirement and not those who have accepted a service retirement in place of termination.”).

88. See CAL. PENAL CODE § 872 (amended by Chapter 18) (lacking any definition of “honorably retired”).

89. Interview with Dan Felizzatto, *supra* note 31.

90. *Id.*

91. See *supra* note 87 and accompanying text.

92. Email from Dan Felizzatto, Legis. Advocate, L.A. County Dist. Att’y’s Office, to author (July 18, 2005, 10:16 PST) (on file with *McGeorge Law Review*) (“[T]he answer to this question [what happens if an officer leaves the police department to pursue a different career] is difficult because it will depend on a case by case scenario. For example, if the officer had [honorably] served for 20 years on a department and then quit to begin a second career . . . the officer would be allowed to testify under [Chapter 18]; if the officer was under a medical disability retirement (injured in a car accident for example with 7 years on the job) they would be honorably retired and could testify . . .”).

93. See Legis. Proposal from Jack Horvath, *supra* note 74, at 1-2 (proposing new legislation that only addresses retired officers); see also Legis. Proposal from Mike Donovan, Cal. Dist. Att’y’s Assoc. to San Bernardino County Dist. Att’y’s Office, at 1-2 (Aug. 1, 2004) (on file with the *McGeorge Law Review*) (addressing retired officers only).

94. See Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 513-14 (1998) (arguing Proposition 115 decreases the effectiveness of preliminary hearings as a screening device and check on prosecutorial discretion); Christine Mahr, *Alleged Victims Still Missing; Judge Folds Kidnapping Trial*, DESERT

of section 872,<sup>95</sup> the criticisms aimed at section 872 can be applied equally to Chapter 18.

A recent criticism of section 872 arose when a district attorney used it in a case against three alleged kidnappers.<sup>96</sup> In that case, an officer testified about the victims' statements because the district attorney could not locate the victims in time for the preliminary hearing.<sup>97</sup> Based on the officer's testimony, the judge found probable cause and the defendants were jailed until trial.<sup>98</sup> After the preliminary hearing, the district attorney's search for the victims remained unsuccessful.<sup>99</sup> While the judge ultimately dismissed the case because the district attorney could not proceed without the victims' testimony, the defendants remained incarcerated until the dismissal.<sup>100</sup> As the defendants' attorney criticized, the case would not have continued past the preliminary hearing without section 872.<sup>101</sup>

While situations like the case above are infrequent, Riverside County Chief Deputy District Attorney Craig Datig recognizes it is "not an unusual situation" for district attorneys to dismiss cases between the preliminary hearing and trial.<sup>102</sup> Dismissing a case after probable cause is found at the preliminary hearing is a "risk of doing business under Proposition 115," which is one reason that some jurisdictions are hesitant to use section 872 for certain cases.<sup>103</sup> At the same time, a case may be dismissed after a preliminary hearing even when section 872 is not used;<sup>104</sup> thus, Chapter 18's supporters do not view the risk of dismissing a case after a preliminary hearing as a legitimate argument against Chapter 18 or section 872.<sup>105</sup>

Section 872 is also criticized for potentially decreasing "the effectiveness of preliminary hearings as a screening device and a check on prosecutorial discretion."<sup>106</sup> Such critics argue that the declarant's absence potentially impairs the magistrate's ability to assess the declarant's credibility and the defendant's opportunity to attack the declarant's credibility through cross-examination.<sup>107</sup> Still, these criticisms did not defeat section 872 when it was democratically and judicially tested.<sup>108</sup>

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SUN, (Palm Springs, Cal.) July 7, 2004, at B1.

95. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 5 (Apr. 5, 2005).

96. Mahr, *supra* note 94.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Telephone Interview with Craig Datig, *supra* note 75.

103. *Id.*

104. *See id.* (explaining that witnesses could testify at the preliminary hearing then disappear or change their minds).

105. *Id.*; Interview with Dan Felizzatto, *supra* note 31.

106. Berend, *supra* note 94, at 514.

107. *Id.* at 513.

108. *See Whitman v. Super. Ct.*, 54 Cal. 3d 1063, 1078, 820 P.2d 262, 270-71 (1991) (conceding that the reliability of hearsay offered at preliminary hearings may remain untested at trial).

Not only did criticism of section 872 fail to defeat its passage in 1990, critics did not express such concerns about Chapter 18. In practice, opponents of section 872 lose nothing with Chapter 18 because, in most counties, judges were already admitting retired officers' hearsay testimony at preliminary hearings.<sup>109</sup>

## V. CONCLUSION

In its simplest terms, Chapter 18 extends section 872 to retired officers.<sup>110</sup> Within the courtroom, however, Chapter 18 does little, if anything, to change a district attorney's ability to prove probable cause with a retired officer as the only testifying witness.<sup>111</sup> Specifically, even though section 872 did not previously apply to retired officers, most district attorneys were able to bring retired officers within its scope by efforts such as reinstating them.<sup>112</sup>

Thus, Chapter 18's core benefit is exactly as its author explained: it makes the process "easier for all of us."<sup>113</sup> By eliminating the hurdles prosecutors faced when an investigating officer had retired, Chapter 18 offers efficiency in the process and certainty in counties where reinstating officers posed problems.<sup>114</sup>

Still, in passing a bill that does little to change the status quo, it seems Chapter 18 provided an opportunity to address additional gaps that could arise when using section 872.<sup>115</sup> Along the same lines, the Legislature could have codified the definitions of "law enforcement officers"<sup>116</sup> and "honorably retired"<sup>117</sup> to prevent ambiguity. Consequently, Chapter 18 can be commended for accomplishing its goals, yet it can also be criticized for lacking a more ambitious goal of solidifying section 872.

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109. Interview with Dan Felizzatto, *supra* note 31.

110. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 557, at 5 (Apr. 5, 2005).

111. Interview with Dan Felizzatto, *supra* note 31.

112. *Id.*

113. Telephone Interview with Jack Horvath, *supra* note 14.

114. Interview with Dan Felizzatto, *supra* note 31; Legis. Proposal from Jack Horvath, *supra* note 74.

115. *See supra* notes 92-93 and accompanying text.

116. *See supra* notes 45-53 and accompanying text.

117. *See supra* notes 85-91 and accompanying text.