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## Criminal Law—California Diversion Statute—Prosecutorial Role in Diversion Decision Clarified and Limited—People v. Sledge

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CRIMINAL LAW—CALIFORNIA DIVERSION STATUTE—PROSECUTORIAL ROLE IN DIVERSION DECISION CLARIFIED AND LIMITED—*People v. Sledge*, 11 Cal. 3d 70, 520 P.2d 412, 113 Cal. Rptr. 28 (1974); *People v. Superior Court*, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).

In 1972, the California Legislature enacted statutory provisions providing for special proceedings in narcotic and drug abuse cases.<sup>1</sup> The purpose of the legislation was to offer an alternative to formal trial and conviction of drug offenders.<sup>2</sup> It provides that, when specified conditions are met, a person charged with one of the enumerated drug offenses may be “diverted” into a drug education, rehabilitation, or treatment program instead of facing prosecution.<sup>3</sup>

The concept of “diversion” is of relatively recent vintage, although it is not a term that is foreign to the law.<sup>4</sup> It generally refers to some form of intervention in the criminal process, whereby the defendant is referred to a noncriminal route for disposition, treatment, or supervision. Diversion, as discussed herein, can be more precisely viewed as “an intervention that takes place after the criminal process has been initiated, that is, after arrest but before trial and conviction.”<sup>5</sup>

The primary purpose behind the California diversion program is twofold. First, it permits the court to identify the experimental or first-time drug user before he becomes deeply involved with narcotics, thereby enabling it to deal directly with any underlying medical or social problems by prompt exposure to educational and counseling programs in the offender’s own community.<sup>6</sup> The aim is to restore him to

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1. See CAL. PENAL CODE §§ 1000-1000.4 (West Supp. 1974).

2. See Note, *Diversion of Drug Offenders in California*, 26 STAN. L. REV. 923 n.2 (1974) [hereinafter cited as *Diversion*].

3. *Id.* at 923-25.

4. BLACK’S LAW DICTIONARY 564 (1968) defines diversion as “a turning aside or altering of the natural course of a thing.” See, e.g., *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 26, 119 P.2d 1, 5 (1941) (unauthorized changing of water course to the prejudice of a lower proprietor); *Farray v. Security Nat’l Bank*, 4 S.W.2d 331, 335 (Tex. 1928) (unauthorized or illegal use of corporate funds).

5. Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 673 (1972) [hereinafter cited as *Addict Diversion*]. See note 30 *infra* for a discussion of the various times during the criminal process when diversion may be applied.

6. *People v. Superior Court*, 11 Cal. 3d 59, 61, 520 P.2d 405, 407, 113 Cal. Rptr. 21, 23 (1974).

productive citizenship without the lasting stigma of criminal prosecution and conviction.<sup>7</sup> Secondly, reliance on this method of disposition, when appropriate, reduces the clogging of the criminal justice system that is brought about by the myriad of drug abuse prosecutions and thus enables the courts to devote their limited time and resources to cases requiring complete criminal processing.<sup>8</sup>

Although diversion potentially offers a new method of social control that emphasizes human service rather than punishment for first-time drug offenders, its implementation and application by the judicial system are not without problems.<sup>9</sup> Two such problems arose as a result of provisions which granted the district attorney sole authority to determine eligibility for diversion<sup>10</sup> and which purported to subject the court's decision on diversion to a prosecutorial veto.<sup>11</sup> The issue of

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7. *Id.*

8. *Id.* at 61-62, 520 P.2d at 407, 113 Cal. Rptr. at 23; see Robertson, *Pre-trial Diversion of Drug Offenders: A Statutory Approach*, 52 B.U.L. REV. 335, 336-37 (1972) [hereinafter cited as Robertson]; *Addict Diversion*, *supra* note 5, at 672-73.

9. Robertson, *supra* note 8, at 337-38; see *Diversion*, *supra* note 2, at 933-34 n.63.

10. CAL. PENAL CODE § 1000.1 (West Supp. 1974) provides in pertinent part:

If the district attorney determines that this chapter may be applicable to the defendant, he shall advise the defendant or his attorney of such determination. If the defendant consents and waives his right to a speedy trial the district attorney shall refer the case to the probation department.

11. *Id.* § 1000.2 (West Supp. 1974) provides in pertinent part:

The defendant's case shall not be diverted unless the district attorney concurs with the court's determination that the defendant be so referred though such concurrence is not necessary with respect to the program to which the defendant is referred.

(Emphasis added.)

Although seemingly unique to the California statute, this requirement of the district attorney's consent has emerged previously in similar diversion statutes in other jurisdictions. In fact, it is characteristic of many diversion programs that the district attorney retains a right of final determination at the point where an otherwise eligible defendant formally requests to be diverted. Representative of this type of program is the New York statutory provision which was first enacted in 1967 for treatment in lieu of prosecution. N.Y. MENTAL HYGIENE LAW § 210(2)(d) (McKinney 1971) provides in pertinent part:

A defendant against whom an indictment, information or complaint is pending is eligible for civil certification if: . . . (d) the charge against him is a felony and the district attorney consents to such certification . . . .

(Emphasis added.)

Similarly, CONN. GEN. STAT. ANN. § 19-484(a) (1969) provides that:

If the accused person is reported to have been probably drug dependent . . . , upon agreement between the prosecutor and the accused person, the court may . . . release the accused person to the custody of the commission on adult probation for treatment . . . .

The district attorney is not given as great a degree of discretion in all jurisdictions. The Massachusetts diversion statute, enacted in 1969, varies significantly from other state statutes. MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1971). In speaking to the decision on diversion, the statute provides:

In the event that the defendant requests commitment, and if the court determines

whether or not these provisions infringed upon the constitutional realm of the judiciary was resolved by the California Supreme Court in the companion cases of *Sledge v. Superior Court*<sup>12</sup> and *People v. Superior Court (On Tai Ho)*.<sup>13</sup>

In *Sledge v. Superior Court*, the defendant was charged with violation of former Health and Safety Code sections 11500, 11530, and 11556.<sup>14</sup> Prior to trial, Sledge requested to be considered for the diversion program. After reviewing defendant's file, however, the district attorney refused to initiate diversion proceedings.<sup>15</sup> Defendant responded by making a motion to the court for an order of referral notwithstanding the district attorney's refusal to act. The trial court declined to consider the motion on the ground that section 1000 gave the district attorney sole authority to determine the initial eligibility for the program.<sup>16</sup> The California Supreme Court upheld the lower court's denial of the writ on the ground that the preliminary determination is not an exercise of judicial power and, hence, does not violate the California constitutional requirement of separation of powers.<sup>17</sup>

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that the defendant is a drug dependent person who is a drug addict who would benefit by treatment . . . the court shall order that the defendant is committed to the division without consideration of any other factors.

*Id.* (emphasis added). See *Addict Diversion*, *supra* note 5, at 676-87 for a thorough discussion of presently existing addict diversion programs under state and federal law.

12. 11 Cal. 3d 70, 520 P.2d 412, 113 Cal. Rptr. 28 (1974). CAL. HEALTH & SAFETY CODE ANN. § 11357 (West Supp. 1974) provides in pertinent part:

(a) every person who possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not less than one year or more than 10 years.

The five other divertible offenses covered by the statute are: possession of heroin (*id.* § 11350); possession of restricted dangerous drugs (*id.* § 11377); possession of ingredients for manufacture of methamphetamine (*id.* § 11383); possession of paraphernalia (*id.* § 11364); and being present where narcotics are being used (*id.* § 11365).

The six divertible offenses included within section 1000(a) were renumbered by the Uniform Controlled Substances Act of 1972 as follows:

Old Health & Safety Code §	New Health & Safety Code §
11500	11350
11530	11357
11555	11364
11556	11365
11910	11377
11990	11383

Ch. 1047, § 3, [1972] Cal. Stat. 3015.

13. 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).

14. *Id.* at 73, 520 P.2d at 414, 113 Cal. Rptr. at 30. See note 12 *supra*.

15. 11 Cal. 3d at 73, 520 P.2d at 414, 113 Cal. Rptr. at 30.

16. *Id.* See note 12 *supra*.

17. 11 Cal. 3d at 76, 520 P.2d at 416, 113 Cal. Rptr. at 32.

In *On Tai Ho*, the defendant was detained at the San Francisco airport while en route to his family home in Hawaii for Christmas. A search by airport officials uncovered six ounces of marijuana, and Ho was subsequently arrested and charged with possession of marijuana in violation of California Health and Safety Code section 11357.<sup>18</sup> Ho thereafter noticed a motion for an order diverting his case pursuant to Penal Code sections 1000-1000.3,<sup>19</sup> and, following appropriate filings, including notification by the district attorney that Ho was eligible for the program,<sup>20</sup> the probation department commenced an investigation. The department reported to the court that Ho was a "19-year old college student of exceptional intelligence, the product of a closely knit Oriental family headed by a prominent physician."<sup>21</sup> The

18. See note 19 *infra*.

19. 11 Cal. 3d at 63, 520 P.2d at 408, 113 Cal. Rptr. at 24. The court indicated that after the district attorney has filed the information charging the defendant with possession of marijuana, the defendant must ask to be considered for the diversion program by filing a notice of motion to that effect. In reference to the actual procedure, the court noted that,

[a]lthough section 1000 implies that it is the district attorney who initiates the inquiry into the applicability of this program, in practice the defendants appear to be doing so by serving the district attorney with a notice of motion for an order of diversion, often accompanied by a supporting declaration of eligibility. And although section 1000.1 states it is the district attorney who "shall refer the case to the probation department," such referral is a judicial act and was properly so treated by the parties to this proceeding.

*Id.* at 63 n.4, 520 P.2d at 408 n.4, 113 Cal. Rptr. at 24 n.4.

At this point the district attorney must determine whether the defendant should be considered for diversion by applying the four criteria set out in section 1000(a):

- (1) The defendant has no prior conviction for any offense involving narcotics or restricted dangerous drugs.
- (2) The offense charged did not involve a crime of violence or threatened violence.
- (3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.
- (4) The defendant has no record of probation or parole violations.

CAL. PENAL CODE § 1000(a) (West Supp. 1974). Following the district attorney's determination of eligibility pursuant to section 1000(a), Ho "simultaneously filed (1) a 'notification' by the district attorney declaring defendant to be eligible for diversion under section 1000, (2) defendant's consent to referral and waiver of a speedy trial, and (3) an order of the superior court referring the case to the probation department and fixing a date for hearing." 11 Cal. 3d at 63, 520 P.2d at 408, 113 Cal. Rptr. at 24 (footnote omitted).

20. 11 Cal. 3d at 63-64, 520 P.2d at 408, 113 Cal. Rptr. at 24.

21. After the district attorney has made the preliminary determination of eligibility, the probation department makes two inquiries:

First, it investigates the defendant's character and background to determine whether he would benefit from an educational, treatment, or rehabilitation program. Second, the department reviews the available community drug programs to determine which programs would both benefit the defendant and be willing to accept him.

*Diversion*, *supra* note 2, at 924.

probation report concluded that Ho would benefit from formal instruction on drug abuse<sup>22</sup> and, therefore, recommended that Ho be diverted for a period of one year into a program of drug education and counseling under appropriate supervision.<sup>23</sup>

At the preliminary hearing the lower court declared that it concurred with the recommendation of the probation report and intended to order diversion.<sup>24</sup> The district attorney, however, declined to give his consent,<sup>25</sup> expressing a belief that the program was "inadequate" and that the amount of marijuana involved was too large for diversion.<sup>26</sup> Despite the district attorney's refusal to concur in the program, the court determined that Ho should be diverted.<sup>27</sup> The California Supreme Court<sup>28</sup> upheld the lower court in proclaiming that such a veto

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22. In concluding that Ho would benefit from formal instruction on drug abuse, the probation department took into consideration several factors. They noted that defendant recognized the seriousness of his conduct and was cooperative with the authorities. Ho also revealed, during the investigation, that the marijuana was intended solely for his personal use, and, finally, a records check disclosed that defendant had no prior arrests for any offense. 11 Cal. 3d at 64, 520 P.2d at 408, 113 Cal. Rptr. at 24.

23. 11 Cal. 3d at 64, 520 P.2d at 408, 113 Cal. Rptr. at 24. Section 1000.2 provides that "[t]he period during which the further criminal proceedings against the defendant may be diverted shall be no less than six months nor longer than two years." CAL. PENAL CODE § 1000.2 (West Supp. 1974).

24. 11 Cal. 3d at 64, 520 P.2d at 408, 113 Cal. Rptr. at 24.

25. *Id.*, 520 P.2d at 408-09, 113 Cal. Rptr. at 24-25. Denial of consent was premised on the district attorney's ostensible authority under section 1000.2 which conditions the court's determination on diversion upon concurrence of the district attorney. See note 11 *supra*.

26. The district attorney stated that the quantity of marijuana seized gave rise to "some inference" that it may have been held for sale, although the inference was "probably not a provable one." The court dismissed this contention by noting that the charge filed by the district attorney against the defendant was mere possession. 11 Cal. 3d at 64 n.5, 520 P.2d at 409 n.5, 113 Cal. Rptr. at 25 n.5.

27. The lower court ruled that

[t]he record will reflect we recognize the nature of the statute that says this cannot be done without the concurrence of the District Attorney and I find that that part of the statute is unconstitutional as violating the separation of powers—taking power away from the court in the matter of sentencing.

*Id.* at 64, 520 P.2d at 409, 113 Cal. Rptr. at 25.

28. At oral argument the People, for the first time, urged that, even if the veto power in the district attorney were invalid, it is not severable from the remainder of the statute. The majority pointed out that it was improper to raise such new points at oral argument and ordinarily such questions would not be entertained. The court, however, did consider the question and citing *People v. Navarro*, 7 Cal. 3d 248, 264, 497 P.2d 481, 492, 102 Cal. Rptr. 137, 148 (1972), resolved the issue of severability adversely to the People.

Justice Clark, dissenting, was of the opinion that, if the concurrence requirement is unconstitutional, the entire statute had to fall. He felt that the uniqueness of this statute is such that it is not "manifest" that the legislature would have enacted it without the

power in the district attorney violated the California constitutional doctrine of separation of powers.<sup>29</sup>

In drawing the distinction between the realms of prosecutorial and judicial power in *Sledge* and *On Tai Ho*, the California Supreme Court focused on several specific provisions of the diversion statute. Under the California statute, the courts are authorized to "'divert' from the normal criminal process persons who are formally charged with first-time possession of drugs, have not yet gone to trial,<sup>30</sup> and are found

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safeguard of district attorney concurrence. 11 Cal. 3d at 69, 520 P.2d at 412, 113 Cal. Rptr. at 28.

29. CAL. CONST. art. 3, § 3 provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The court focused on the district attorney's referral of the case to the probation department, an arm of the judiciary. Having once taken this step, the role of the prosecutor ends and any subsequent attempt to interfere with proceedings of the court becomes an infringement upon the powers of the judiciary. See notes 63-78 *infra* and accompanying text.

30. Although the court clearly discussed Penal Code section 1000 *et seq.* as authorizing the courts to divert persons who have not yet gone to trial, a lower appellate court decision did not limit the purview of the section to that extent.

In *People v. Reed*, 37 Cal. App. 3d 369, 112 Cal. Rptr. 493 (1974), defendant was charged with possession of marijuana. He was arraigned and pleaded not guilty. Counsel notified the court that defendant wished to be diverted, but the probation report recommended the case not be diverted. Defendant went to trial and was found guilty. Prior to sentencing, the court referred the matter to the probation department, who again recommended against diversion, but did recommend probation. The court then asked the defendant if he would consent to diversion. The defendant answered in the affirmative, and over the refusal of the district attorney to concur, the court diverted the defendant. The Court of Appeal, Second District, affirmed, holding that diversion could be accomplished at any time prior to sentencing. *Id.* at 379, 112 Cal. Rptr. at 499.

However, in *Morse v. Municipal Court*, — Cal. 3d —, — P.2d —, — Cal. Rptr. — (1974), Kenneth Morse was also charged with possession of marijuana. At arraignment he did not consent to diversion, but instead pleaded not guilty and moved to suppress the incriminating evidence. The motion was denied. Thereafter the defendant advised the municipal court that he wished to consent to diversion. The prosecutor resisted this proposal since defendant had already elected not to accept diversion and the municipal court denied diversion.

The California Supreme Court reversed, ordering that "a writ of mandamus issue compelling the [municipal] court to commence appropriate proceedings." The court first examined that portion of section 1000.1 which provides that the district attorney shall refer the case to the probation department "[i]f the defendant consents and waives his right to a speedy trial . . . ." CAL. PENAL CODE § 1000.1 (West Supp. 1974). Since the defendant possesses a right to a speedy trial until actual commencement of trial and since the diversion procedure was given no priority in the hierarchy of pre-trial motions, the court concluded that legislature intended diversion to be available until the time of trial. This, along with what the court considered the liberal tenor of the statutory scheme, "require[d] the district attorney to refer a case to the probation department if a defendant, who has previously been determined eligible . . . , consents

to be suitable for treatment and rehabilitation at the local level.”<sup>31</sup> Penal Code section 1000 provides that when a defendant is charged with one of six offenses therein specified,<sup>32</sup> the district attorney will review the defendant’s file to determine whether the accused meets the statute’s minimum standards for diversion, which require that:

- (1) The defendant has no prior conviction for any offense involving narcotics or restricted dangerous drugs.
- (2) The offense charged did not involve a crime of violence or threatened violence.
- (3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.
- (4) The defendant has no record of probation or parole violations.<sup>33</sup>

The court in *Sledge*, concerned with these standards and their limitation upon prosecutorial power, predicated its decision upholding the district attorney’s determination of ineligibility on the nature of the information required under section 1000.<sup>34</sup>

As to the source of information, the court noted that prior narcotics convictions or probation and parole violations are quickly and accurately revealed by an examination of records maintained by federal, state, or local enforcement organizations.<sup>35</sup> The questions of whether or not the present offense involved actual or threatened violence and whether or not there is “evidence” of the commission of a narcotics offense other than those listed in section 1000 can likewise be established by consideration of oral or written reports of defendant’s current conduct by such persons as “investigating officers, arresting officers, victims, witnesses, accomplices, and possibly the defendant himself.”<sup>36</sup>

The *Sledge* defendant questioned the broad discretion of the district attorney to determine whether or not there is “evidence” of the commission of a narcotics offense other than simple possession, alleging that “the district attorney [could], rely on mere suspicion of illegal activity and that his determination of ineligibility on that ground is not

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to diversion and waives his right to a speedy trial *at any time prior to the commencement of trial.*”

31. 11 Cal. 3d at 61, 520 P.2d at 407, 113 Cal. Rptr. at 23.

32. See note 12 *supra*.

33. CAL. PENAL CODE § 1000(a) (West Supp. 1974).

34. 11 Cal. 3d at 73, 520 P.2d at 414, 113 Cal. Rptr. at 30.

35. *Id.*; but see *Diversion*, *supra* note 2, at 936-40.

36. 11 Cal. 3d at 73-74, 520 P.2d at 414, 113 Cal. Rptr. at 30; but see *Diversion*, *supra* note 2, at 939-40.



subject to judicial review.”<sup>37</sup> The court summarily dismissed both allegations<sup>38</sup> and noted that the legislative purpose was to render ineligible a limited class of persons, namely, “those who are dealing in illegal narcotics but who have never previously been convicted of any drug offense and whom the district attorney cannot or does not choose to charge with trafficking.”<sup>39</sup> In reference to the quantum of “evidence” necessary before a defendant can be excluded as a member of such a class it was stated that

“[e]vidence,” of course, means more than mere suspicion or rumor; it means, in this context, reports of actual instances of trafficking or other information showing that the defendant has probably committed narcotics offenses in addition to those listed in the statute.<sup>40</sup>

Although the court purports to lay down a rule or guideline within which the district attorney’s determination of “evidence” must be confined, it is questionable whether it has in fact done so. In *Sledge*, there was evidence in the file that defendant was a dealer in drugs, had been previously convicted of carrying a concealed weapon, and had been arrested for possession of marijuana on several previous occasions.<sup>41</sup> There was additional information from informants that defendant was trafficking in drugs, thus placing him among the class of persons who is ineligible for diversion.<sup>42</sup>

In its attempt to negate the defendant’s allegations that a “mere suspicion” of illegal activity is sufficient to establish “evidence” of other narcotics offenses not covered by the statute, the court set forth a rather amorphous definition of “evidence,” namely, “other information showing that defendant has probably committed narcotics offenses in addition to those listed in the statute.” Just what “other information” the district attorney may rely on is not mentioned, although the court was careful to note that the “inquiry need not be limited to information admissible at a full-fledged criminal trial.”<sup>43</sup>

Although the holding in *Sledge* supports the constitutionality of

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37. 11 Cal. 3d at 74-75, 520 P.2d at 415, 113 Cal. Rptr. at 31.

38. *Id.* at 75, 520 P.2d at 415, 113 Cal. Rptr. at 31.

39. *Id.* The court noted that it permitted the issue to be raised by petition for an extraordinary writ because of the “need for a prompt and definitive resolution of this constitutional challenge to a new statutory program.” *Id.* at 75-76 n.5, 520 P.2d at 416 n.5, 113 Cal. Rptr. at 32 n.5.

40. *Id.* at 75, 520 P.2d at 415, 113 Cal. Rptr. at 31.

41. *Id.* at 75 n.4, 520 P.2d at 415 n.4, 113 Cal. Rptr. at 31 n.4.

42. *Id.*

43. *Id.* at 75, 520 P.2d at 415, 113 Cal. Rptr. at 31.

such a determination, in light of the definition of "evidence," it arguably could be viewed as a discretionary rather than a ministerial function, with the prosecutor free to independently determine how the standards are to be applied.<sup>44</sup> This discretionary finding occurs prior to the court's decision to divert, and it conditions the power of the court to order diversion, a judicial function, on the approval of the prosecutor. The California Supreme Court did not specifically address itself to this question, but merely implied that the prosecutor's role is ministerial.<sup>45</sup> However, regardless of whether this determination is discretionary or ministerial, due process would seem to require that the defendant be given some opportunity to challenge an unfavorable finding by the prosecutor.<sup>46</sup>

It was to this point that the defendant next turned his attention, and once again the court summarily dismissed his contention, noting that "the decision of the district attorney that a defendant is ineligible on this ground is subject to judicial review at the proper time."<sup>47</sup> According to the court, the proper time is after trial when defendant stands convicted. He may raise on appeal the question of whether or not there was "evidence," as defined in this case, of his commission of other narcotics offenses within the meaning of subsection 3 of subdivision (a).<sup>48</sup> Upon a finding of insufficient "evidence," the judgment

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44. In *Elder v. Anderson*, 205 Cal. App. 2d 326, 331, 23 Cal. Rptr. 48, 51 (1962), quoting *State ex rel. Hammond v. Wimberly*, 196 S.W.2d 561, 563 (Tenn. 1946), the court distinguished discretionary and ministerial acts in noting that there were no hard and fast rules governing the conduct one must or must not take, but "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial . . ."

45. 11 Cal. 3d at 74, 520 P.2d at 415, 113 Cal. Rptr. at 31. In implying that the acts of the district attorney are merely ministerial, the court noted that the statute "leaves no room for weighing the effect of the facts" and that

[t]here is no provision here . . . for the exercise of judicial discretion to admit an otherwise ineligible defendant to the program "in the interests of justice," and therefore no risk of arbitrary prosecutorial refusal to concur in that decision.

*Id.*

46. The court in *Sledge* dismissed defendant's allegations of a violation of due process in noting that

inasmuch as the resulting ineligibility of persons who have a history of drug abuse or crimes of violence is rationally related to the purposes of this legislation . . . no denial of equal protection is shown.

11 Cal. 3d at 76 n.7, 520 P.2d at 416 n.7, 113 Cal. Rptr. at 32 n.7; *but see Diversion*, *supra* note 2, at 929-30 & nn. 37-44.

47. 11 Cal. 3d at 75, 520 P.2d at 416, 113 Cal. Rptr. at 32.

48. *Id.* at 76, 520 P.2d at 416, 113 Cal. Rptr. at 32. The court suggested that, in order to provide an adequate record for appeal, the district attorney should serve on the defendant and file with the court a declaration stating the ground upon which the deter-

must be set aside and the case remanded to permit the trial court to exercise its discretion to divert the defendant under the remaining portions of the statute.<sup>49</sup> Although theoretically providing an opportunity for judicial review, when one considers the definition of "evidence" to be applied upon review, meaningful review does not appear promising.<sup>50</sup>

In rejecting the defendant's final claim that the district attorney's determination violates the constitutional doctrine of separation of powers, the court noted that, unlike the trial court which must "consider" the evidence submitted, the district attorney need not base his decision of initial eligibility upon information specified as relevant or material under the statute.<sup>51</sup> Furthermore, credibility is not an issue when information is obtained from official records and reports.<sup>52</sup> Thus, the court concluded that the "preliminary screening for eligibility conducted by the district attorney pursuant to section 1000, based on information peculiarly within his knowledge and in accordance with standards prescribed by statute, does not constitute an exercise of judicial authority . . . ."<sup>53</sup>

With this distinction in mind, the California Supreme Court examined a similar "discretionary" provision providing for prosecutorial veto in the companion case of *People v. Superior Court (On Tai Ho)*.<sup>54</sup> Proceeding one step further, the California diversion statute provides that, if it appears that the defendant may be eligible for the program, it becomes necessary to investigate the facts bearing on the particular defendant's suitability for diversion. This responsibility is assigned by section 1000.1 to the probation department.<sup>55</sup> After further determining which community programs would benefit and accept the defendant, the probation department reports its findings and

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mination of ineligibility is based and the evidence in support thereof. *Id.* at 76 n.6, 520 P.2d at 416 n.6, 113 Cal. Rptr. at 32 n.6.

49. *Id.* at 75-76, 520 P.2d at 416, 113 Cal. Rptr. at 32.

50. See text accompanying note 40 *supra*.

51. 11 Cal. 3d at 74, 520 P.2d at 415, 113 Cal. Rptr. at 31; cf. notes 33-42 *supra* and accompanying text.

52. 11 Cal. 3d at 76, 520 P.2d at 415, 113 Cal. Rptr. at 31.

53. *Id.* at 76, 520 P.2d at 416, 113 Cal. Rptr. at 32.

54. 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).

55. CAL. PENAL CODE § 1000.1(a) (West Supp. 1974) provides in part:

If the defendant consents and waives his right to a speedy trial the district attorney shall refer the case to the probation department. The probation department shall make an investigation and take into consideration the defendant's age, employment and service records, educational background, community and family ties, prior narcotics or drug use, treatment history, if any, demonstrable motivation and other mitigating factors in determining whether the defendant is a person who would be benefited by education, treatment, or rehabilitation,

recommendations to the court.<sup>56</sup> The court then weighs the facts presented by the probation department, and any other relevant information, prior to making the decision either diverting or refusing to divert the defendant into a rehabilitation program.<sup>57</sup> Although these provisions seemingly provide a first-time drug offender with a viable means of avoiding the stigma of a full-scale criminal trial, any determination regarding diversion of the defendant rests solely with the district attorney, the result of the prosecutorial veto provided in section 1000.2.<sup>58</sup>

A prosecutorial veto over the decision of a trial judge has been considered and rejected as unconstitutional by the California Supreme Court in several analogous situations prior to *On Tai Ho*. Relying on *People v. Tenorio*,<sup>59</sup> *Esteybar v. Municipal Court*,<sup>60</sup> *People v. Navarro*,<sup>61</sup> and *People v. Clay*,<sup>62</sup> the California Supreme Court concluded

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56. *Id.* This section also specifies that

[t]he probation department shall also determine which community programs the defendant could benefit from and which of those programs would accept the defendant. The probation department shall report its findings and recommendation to the court.

57. *Id.* § 1000.2, which provides:

The court shall hold a hearing and, after consideration of the probation department's report and any other information considered by the court to be relevant to its decision, shall determine if the defendant consents to further proceedings under this chapter and waives his right to a speedy trial and if the defendant should be diverted and referred for education, treatment, or rehabilitation.

Section 1000.2 also notes that the period of diversion is limited to a minimum of six months and a maximum of two years, during which time progress reports are filed by the probation department with the court bi-annually. When and if the defendant successfully completes the program, the charges brought against him are dismissed. However, if the defendant is convicted of any offense during the period of the program, his diverted case is returned to court for resumption of the original criminal proceedings.

58. See note 11 *supra* for pertinent text.

59. 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970).

60. 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971). Defendant was charged with possession of marijuana, an offense which, in the absence of any prior felony convictions, may be treated as either a felony or misdemeanor. After the preliminary hearing, the magistrate attempted to hold the defendant to answer on a misdemeanor charge in municipal court. The district attorney, upon the authority of Penal Code section 17(b)(5), insisted that the defendant be held to answer on a felony charge in superior court. On the same grounds as in *Tenorio* (see text accompanying note 65 *infra*), this section was nullified with respect to the provision that conditioned the power of the committing magistrate to determine whether a charged offense would be tried as a misdemeanor rather than a felony upon the consent of the district attorney.

61. 7 Cal. 3d 248, 497 P.2d 481, 102 Cal. Rptr. 137 (1972). Defendant was convicted of selling and furnishing heroin. Imposition of sentencing was suspended pursuant to section 3051 of the California Welfare and Institutions Code to determine if defendant was a narcotics addict, and thus eligible for commitment to the custody of the Director of Corrections for confinement in the narcotic detention, treatment, and

that the decision to divert a defendant into a rehabilitation program is an exercise of judicial power and thus cannot constitutionally be subordinated to a veto of the prosecutor.<sup>63</sup> It was to this precise question that the People had directed their appeal, contending that the decision to divert is not a judicial decision, but rather is an extension of the charging process, and, hence, remains within the traditional zone of the district attorney's discretion.<sup>64</sup>

In an attempt to uphold this contention, the People sought to distinguish *Tenorio*, a case in which the defendant was arrested for possession of marijuana in violation of Health and Safety Code section 11530, which also imposed minimum prison terms for convictions with one or two prior convictions. The *Tenorio* trial court dismissed allegations of defendant's eight-year old prior conviction without approval of the district attorney, therefore violating Health and Safety Code section 11718. In holding that the requirement of approval from the district attorney violated the California constitutional requirement of separation of powers, the California Supreme Court noted: "When the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature."<sup>65</sup>

Arguably, this rationale could be viewed as inapposite to the diversion of a defendant from the criminal process in the sense that the diversion program does not lead to, enhance, or further either acquittal or sentencing, and a district attorney's refusal to consent to diversion means only that a defendant will go to trial as charged.<sup>66</sup> If in fact the defendant is diverted, the criminal process is actually halted while

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rehabilitation facility. Defendant was found to be an addict. The court then held a sentencing hearing to determine if section 3052 of the California Welfare and Institutions Code precluded commitment of the defendant to the treatment program. Section 3052 could be a bar to his commitment because of defendant's prior conviction for assault. However, section 3051 modifies this by providing that "in unusual cases" section 3052 could be ignored if the district attorney concurred. The district attorney refused. The court, however, said that section 3051, which subjected the power of the trial court to civilly commit a defendant in the interests of the justice to the concurrence of the district attorney, was invalid as an infringement of the judicial power.

62. 18 Cal. App. 3d 964, 96 Cal. Rptr. 213 (1971). The Court of Appeal invalidated the language of California Penal Code section 1203 which conditioned the trial court's power to grant probation in the interests of justice upon the district attorney's concurrence.

63. 11 Cal. 3d at 65, 520 P.2d at 409, 113 Cal. Rptr. at 25.

64. *Id.*

65. 3 Cal. 3d at 94, 473 P.2d at 996, 89 Cal. Rptr. at 252, *cited at* 11 Cal. 3d at 65, 520 P.2d at 410, 113 Cal. Rptr. at 26.

66. 11 Cal. 3d at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26.

defendant is placed in a civil treatment program for six months to two years.<sup>67</sup> The charges against the defendant are dismissed if he successfully performs in the program.<sup>68</sup> It would therefore appear that diversion leads away from acquittal or sentencing while leading to civil treatment programs and ultimate dismissal of the pending charges.

The reasoning can be buttressed by the fact that the actual diversion hearing is not a typical hearing where defendant's rights are in jeopardy. Although prior to the diversion hearing defendant must waive his right to a speedy trial,<sup>69</sup> the diversion report that is made to the court and any statement or information provided by the defendant are inadmissible in any subsequent proceeding involving the same charge.<sup>70</sup> Thus, it would appear that this program in no way aids the process leading to acquittal or sentencing.

In dispensing with the contention that the diversion decision is but an extension of the charging process, the court first noted that the People were "reading *Tenorio* and the present statute too narrowly."<sup>71</sup> A rational interpretation of the foregoing principle in *Tenorio*<sup>72</sup> resulted in the conclusion that, when the jurisdiction of a court has been invoked by the filing of a criminal charge, any disposition of that charge is a judicial responsibility.<sup>73</sup> In support of this interpretation of *Tenorio*, emphasis was placed on the court's prior decision in *Esteybar* where it was declared: "This argument overlooks the fact that the magistrate's determination follows the district attorney's decision to prosecute."<sup>74</sup>

The court went on to explain that the statutory scheme is expressly declared applicable when, and only when, the case is "before any court

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67. See note 57 *supra*.

68. See note 57 *supra*.

69. CAL. PENAL CODE § 1000.1(a) (West Supp. 1974) provides in part: "If the defendant consents and waives his right to a speedy trial the district attorney shall refer the case to the probation department."

70. *Id.* § 1000.1(b) provides in part:

No statement, or any information procured therefrom, made by the defendant to any probation officer which relates to the specific offense with which the defendant is charged . . . shall be admissible in any action or proceeding brought subsequent to the investigation, with respect to the specific offense with which the defendant is charged.

71. 11 Cal. 3d at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26.

72. *Id.*

73. *Id.*

74. 5 Cal. 3d at 127, 485 P.2d at 1145, 95 Cal. Rptr. at 529.

upon an accusatory pleading."<sup>75</sup> By the time the case has gone through the probation investigation and report prescribed by section 1000.1, and reaches the hearing mandated by section 1000.2, "the prosecutorial die has long since been cast."<sup>76</sup> The case is before the court for disposition, and disposition is a function of the judicial power irrespective of the outcome.

Thus it appears that once the district attorney has made a determination of eligibility under section 1000 and allowed the case to enter the probation department, his role in the decision to divert has ended since the case has passed into the realm of the judiciary. The court's conclusion in *Sledge* rested upon the district attorney's power under section 1000 to determine preliminary eligibility.<sup>77</sup> In denying eligibility, the case did not leave the hands of the district attorney until trial and never reached the probation department.

Having once committed the case to the probation department, the district attorney cannot subsequently change his mind or in any way interfere with the final determination of the court. In making its determination, the court admitted that acquittal or sentencing are the typical options open to the court, but in appropriate cases alternate means of disposition have been entrusted to the judiciary.<sup>78</sup>

Probation is a method frequently utilized in dealing with this type of anti-social behavior.<sup>79</sup> Civil commitment to a narcotics addict rehabilitation program has also been cited by the supreme court as a disposition which may be viewed as a specialized form of probation, one that was held in *Navarro* to be an exercise of the judicial power.<sup>80</sup> The court analogized the present diversion program to this judicial power in probation and inferred that, indeed, the decision to divert is a judicial power.<sup>81</sup>

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75. 11 Cal. 3d at 65, 520 P.2d at 409-10, 113 Cal. Rptr. at 25-26.

76. *Id.*

77. *Id.* at 75, 520 P.2d at 416, 113 Cal. Rptr. at 32. See notes 30-40 *supra* and accompanying text.

78. 11 Cal. 3d at 65, 520 P.2d at 409-10, 113 Cal. Rptr. at 25-26.

79. See note 81 *infra*.

80. See note 61 *supra*.

81. In dealing with the requirement of the district attorney's consent to the commitment of a defendant to the custody of the Director of Corrections, the court in *Navarro* was of the opinion that "the Legislature . . . can control eligibility for probation, parole, and the term of imprisonment, but it cannot abort the judicial process by subjecting a judge to the control of the district attorney." 7 Cal. 3d at 259, 497 P.2d at 488, 102 Cal. Rptr. at 144. It is true that the legislature is not required in the first instance to give the court power to commit to treatment programs, but, having conferred this power,

The People's final contention was that the diversion hearing is merely a "quasi-administrative" inquiry into defendant's suitability for a civil treatment program."<sup>82</sup> Although the parties are the same as in the criminal process, it was stressed that the impact and effect of the diversion hearing are really quasi-administrative. Similarities can be shown between the diversion hearing and the historical administrative treatment of juvenile offenders where, although the hearing appears to be a criminal one, it is actually administrative in nature, attempting to rehabilitate rather than to punish.<sup>83</sup> As in the administrative treatment of juveniles, the diversion of abusers of controlled substances fosters rehabilitation and treatment in a non-criminal environment.<sup>84</sup> In enacting sections 1000-1000.4, the legislature intended such rehabilitation and not criminal incarceration.<sup>85</sup> The very word "diversion" implies treatment that is not part of the criminal process but is instead a separate, civilly-oriented treatment program.<sup>86</sup> Therefore, the People argued that the judge's role in the diversion hearing is similar to that of a hearing officer at an administrative proceeding and that, accordingly, the legislature intended the decision to divert to be made by both the judge and the district attorney.<sup>87</sup>

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it cannot condition its exercise upon the approval of the district attorney. *Id.* at 259-60, 497 P.2d at 488-89, 102 Cal. Rptr. at 144-45. The court here held that diversion may be viewed as a specialized form of probation. Like programs of probation, diversion is intended to offer a second chance to defendants who are "minimally involved in crime and maximally motivated to reform." 11 Cal. 3d at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26. The decision to divert is predicated on an in-depth appraisal of the background and personality of the particular individual before the court.

82. 11 Cal. 3d at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26.

83. The United States Supreme Court pointed out the administrative nature of the treatment of juvenile offenders in *In re Gault*, 387 U.S. 1, 15-16 (1967), when it stated: The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.

84. One commentator has noted:

In addition, diversion is humane—it deals directly with the underlying medical and social problems of drug dependency. The chances of altering drug-related behavior are better when carried out through treatment rather than through incarceration or other criminal dispositions. With prosecution stayed and dismissal of charges possible, the defendant avoids the stigma and adverse consequences of a criminal conviction and the expenses associated with prosecution.

Robertson, *supra* note 8, at 336.

The concept of diversion has arisen

[b]ecause the traditional process of trial, conviction, and incarceration has failed to rehabilitate drug-dependent defendants and to stop the revolving door of crime, new ways of dealing with the problem must be found.

*Addict Diversion*, *supra* note 5, at 669.

85. See text accompanying note 8 *supra*.

86. See text accompanying note 5 *supra*.

87. However appealing this argument may be, it is clear that a member of the judi-



In response, Justice Mosk, for the majority, indicated that "a court hearing need not be a full-fledged criminal trial in order to constitute an exercise of the judicial power."<sup>88</sup> The diversion hearing mandated by section 1000.2 is, by its terms, a judicial proceeding wherein the court undertakes a "consideration" of the probation department's report and of "any other information considered by the court to be relevant to its decision."<sup>89</sup> The court may then take evidence, hear arguments and find the operative facts, all of which are clearly judicial acts.<sup>90</sup> The district attorney may screen for eligibility,<sup>91</sup> the probation department may investigate the facts, but it is the court which makes the final decision to divert.<sup>92</sup>

It would also appear that either of the consequences of the decision to divert is itself an exercise of the judicial power. If the defendant fails the program his case will be "referred to the court for arraignment and disposition" as "a regular criminal matter."<sup>93</sup> But, if the defendant is successful under the program, "the charges shall be dismissed."<sup>94</sup> Under California law, the dismissal of a formally filed criminal charge is a judicial act which can be performed only by the court.<sup>95</sup>

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ciary has no power to sit as an administrative officer unless that power is authorized by the California constitution. This longstanding proposition was articulated in *People v. McKamy*, 168 Cal. 531, 532, 143 P. 752, 753 (1914), wherein the court stated: "[t]hat the legislature has no power to confer upon the courts jurisdiction beyond that given or authorized to be given them by the Constitution has long been settled." Since the California constitution does not provide that a judge may sit as an administrative hearing officer, any performance of such a duty is outside the scope of his jurisdictional power. See note 29 *supra*.

88. 11 Cal. 3d at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26.

89. CAL. PENAL CODE § 1000.2 (West Supp. 1974). This procedure is to be contrasted with the district attorney's preliminary determination where materiality and relevancy are not at issue. 11 Cal. 3d at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26. See note 51 *supra* and accompanying text.

90. *Id.*, citing *Esteybar v. Municipal Court*, 5 Cal. 3d 119, 127, 485 P.2d 1140, 1145, 95 Cal. Rptr. 524, 529 (1971), wherein the court stated:

Within the statutory framework, the magistrate at a preliminary hearing acts as an independent arbiter of the issues presented by the adversaries. He weighs evidence, resolves conflicts and gives or withholds credence to particular witnesses, and just as these are judicial acts, so is the act of holding a defendant to answer.

(Citation omitted.)

91. 11 Cal. 3d at 67, 520 P.2d at 411, 113 Cal. Rptr. at 27.

92. *Id.*

93. *Id.*; CAL. PENAL CODE § 1000.2 (West Supp. 1974).

94. 11 Cal. 3d at 67, 520 P.2d at 411, 113 Cal. Rptr. at 27.

95. CAL. PENAL CODE § 1385 (West 1970) provides:

The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the

In response to the California Supreme Court's attack on the constitutionality of these provisions, the legislature recently reconsidered the diversion statute in an attempt to bring the scope of the provisions within constitutional parameters.<sup>96</sup> A.B. 3096, as proposed, would have amended the diversion statute to conform with the supreme court's pronouncements in the *Sledge* and *On Tai Ho* cases.<sup>97</sup> The legislature, however, chose only to extend the life of the diversion statute,<sup>98</sup> leaving the prosecutorial veto invalidated in *On Tai Ho* intact.<sup>99</sup>

A.B. 3096, although proposing to delete the prosecutorial veto, would have left unchanged the power of the district attorney to determine initial eligibility. As previously discussed, the California Supreme Court in *People v. Sledge* upheld the constitutionality of this provision by implying that the district attorney's role is ministerial, not discretionary.<sup>100</sup> Irrespective of whether the district attorney's role is categorized as ministerial or discretionary, due process would seem to require that the defendant be given some opportunity to contest the findings of the district attorney. If the district attorney's duty is ministerial, a hearing would insure that a finding of ineligibility could not be based on any misinformation or clerical error.<sup>101</sup> If the function is discretionary, a hearing would provide review to protect against abuse of that discretion.<sup>102</sup> A.B. 3096 failed to address itself to the obvious need for due process protection.

The United States Supreme Court in *Morrissey v. Brewer*,<sup>103</sup> in finding a parolee's liberty in parole revocations to be an interest requiring

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accusatory pleading.

In furtherance of this policy, Penal Code section 1386 provides:

The entry of a nolle prosequi is abolished, and neither the Attorney General nor the District Attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section.

CAL. PENAL CODE § 1386 (West 1970).

In interpreting section 1386 the court in *People v. Parks*, 230 Cal. App. 2d 805, 41 Cal. Rptr. 329 (1964), noted: "Entry of a nolle prosequi . . . has been abolished in California; a district attorney can only recommend dismissal to the court. Dismissal is within the latter's [the court's] exclusive discretion." *Id.* at 811-12, 41 Cal. Rptr. at 334, citing CAL. PENAL CODE §§ 1385-86; *People v. Romero*, 13 Cal. App. 2d 667, 670, 57 P.2d 557, 558 (1936).

96. Cal. A.B. 3096, Reg. Sess. (1974).

97. *Id.*

98. Ch. 1014, § 1 [1974] Cal. Stat.

99. See notes 59-87 *supra* and accompanying text.

100. See note 45 *supra*.

101. See *Diversion*, *supra* note 2, at 929 n.37.

102. *Id.*

103. 408 U.S. 471 (1972).

procedural protections, held that procedural safeguards must be provided if "the nature of the [individual's] interest is one within the contemplation of the language of the liberty or property language of the Fourteenth Amendment."<sup>104</sup> The interest of an individual in diversion cases can be viewed as the same as that in parole revocations in that if diversion is precluded, the defendant will be prosecuted, and, since a defendant will ordinarily not request diversion if the case against him is not strong enough to convict, the practical effect of prosecution will be conviction and a loss of liberty. Consequently, a defendant may not be denied diversion without procedural safeguards, including a hearing at which he may challenge the district attorney's grounds for an unfavorable initial finding.<sup>105</sup>

It is possible that the court in *Sledge*, by limiting any judicial review of the facts regarding eligibility until after conviction, may deny a defendant due process of law.<sup>106</sup> The remedy is clearly sufficient when a defendant seeks only to challenge the district attorney's application of concrete facts and not to attack the truthfulness of the district attorney's finding of the facts. However, when the defendant desires to contest the veracity of the district attorney's factual findings, he is limited by the role of the reviewing court. It is at this point that the adequacy of such a post-conviction remedy appears questionable in light of the traditional role of the appellate court.

Traditionally, the function of an appellate court is confined to the review of questions of law rather than of fact, and in the absence of abuse of discretion by the lower court, its findings of fact cannot be disturbed.<sup>107</sup> Because the defendant has had no opportunity to initially challenge the facts of the district attorney as to his ineligibility for diversion, there is no record before the higher court to form a basis for review of the district attorney's findings.<sup>108</sup> It is therefore possible that

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104. *Id.* at 481.

105. *Diversion*, *supra* note 2, at 930.

106. See notes 47 & 48 *supra* and accompanying text.

107. See, e.g., *People v. Henderson*, 138 Cal. App. 2d 505, 292 P.2d 267 (1956) (the test on appeal is whether there is substantial evidence to support the verdict); *People v. Lapin*, 138 Cal. App. 2d 251, 291 P.2d 575 (1956) (it is not within the province of the reviewing court to say that the trial court committed error unless such error appears as a matter of law from the record presented); *People v. Theus*, 136 Cal. App. 2d 722, 289 P.2d 534 (1955) (reviewing court not permitted to reweigh evidence and draw inferences contrary to those drawn by the lower court).

108. See, e.g., *People v. Horton*, 191 Cal. App. 2d 592, 13 Cal. Rptr. 33 (1961) (on review of the sufficiency of the evidence to sustain conviction the appellate court is not permitted to go outside the record of the trial court); *People v. Pike*, 183 Cal. App. 2d

a defendant could be denied diversion, convicted, and thereafter lose on appeal because he was unable in the first instance to challenge the facts and findings of the district attorney.

Whether or not a defendant will be confronted with this dilemma is yet to be seen. However, should the problem arise, it is clear that legislative inaction has left the vindication of defendant's due process rights in the hands of a judiciary that has seemingly given support to procedures which severely limit review of the district attorney's initial determination of eligibility. Orderly review of the district attorney's initial determination is required to ensure that the purposes underlying the diversion statute are not defeated—review which can best be provided for by legislative enactment.

*Michael J. Tramontin*

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729, 7 Cal. Rptr. 188 (1960) (on review of a conviction the court of appeal was not permitted to go outside of the record of the trial court); *People v. McKinney*, 152 Cal. App. 2d 332, 313 P.2d 163 (1957) (defendant could not supplement record on appeal by means of a request to produce additional evidence which was not part of the trial court record).