

AMENDED IN ASSEMBLY MARCH 27, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL

No. 1590

Introduced by Assembly Member Simitian

February 23, 2001

~~An act to amend Section 1013a of the Code of Civil Procedure, relating to service of process. An act to amend Section 1538.5 of the Penal Code, relating to criminal procedure.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 1590, as amended, Simitian. ~~Service of process: unlawful detainer~~ *Criminal procedure: search or seizure hearing.*

Existing law provides with respect to a preliminary examination in a criminal case that the magistrate shall, upon motion of either party, exclude all potential and actual witnesses who have not been examined.

Existing law also authorizes either party to challenge the exclusion of any person under this provision and requires the magistrate, upon motion of either party, to hold a hearing, on the record, to determine if the person sought to be excluded is, in fact, a person excludable under this provision.

This bill would apply these provisions to a hearing held pursuant to a motion to return property or suppress evidence obtained as the result of a search or seizure.

~~Existing law provides the methods by which proof of service by mail may be executed. Existing law further specifies the procedures for a clerk of a court to effectuate service of process.~~

~~This bill would require the court clerk to serve responsive pleadings on behalf of a defendant in an unlawful detainer case if the defendant~~

~~provides the clerk with a copy of the pleading and a preaddressed envelope with first class postage prepaid.~~

~~By imposing new duties on court personnel, this bill would create a state mandated local program.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.~~

~~This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~ *no*. State-mandated local program: ~~yes~~ *no*.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Section 1013a of the Code of Civil Procedure is~~

2 *SECTION 1. Section 1538.5 of the Penal Code is amended to*

3 *read:*

4 1538.5. (a) (1) A defendant may move for the return of
5 property or to suppress as evidence any tangible or intangible thing
6 obtained as a result of a search or seizure on either of the following
7 grounds:

8 (A) The search or seizure without a warrant was unreasonable.

9 (B) The search or seizure with a warrant was unreasonable
10 because any of the following apply:

11 (i) The warrant is insufficient on its face.

12 (ii) The property or evidence obtained is not that described in
13 the warrant.

14 (iii) There was not probable cause for the issuance of the
15 warrant.

16 (iv) The method of execution of the warrant violated federal or
17 state constitutional standards.

18 (v) There was any other violation of federal or state
19 constitutional standards.



1 (2) A motion pursuant to paragraph (1) shall be made in writing
2 and accompanied by a memorandum of points and authorities and
3 proof of service. The memorandum shall list the specific items of
4 property or evidence sought to be returned or suppressed and shall
5 set forth the factual basis and the legal authorities that demonstrate
6 why the motion should be granted.

7 (b) When consistent with the procedures set forth in this section
8 and subject to the provisions of Section 170 to 170.6, inclusive, of
9 the Code of Civil Procedure, the motion should first be heard by
10 the magistrate who issued the search warrant if there is a warrant.

11 (c) (1) Whenever a search or seizure motion is made in the
12 municipal or superior court as provided in this section, the judge
13 or magistrate shall receive evidence on any issue of fact necessary
14 to determine the motion.

15 (2) *While a witness is under examination during a hearing*
16 *pursuant to a search or seizure motion, the judge or magistrate*
17 *shall, upon motion of either party, do any of the following:*

18 (A) *Exclude all potential and actual witnesses who have not*
19 *been examined.*

20 (B) *Order the witnesses not to converse with each other until*
21 *they are all examined.*

22 (C) *Order, where feasible, that the witnesses be kept separated*
23 *from each other until they are all examined.*

24 (D) *Hold a hearing, on the record, to determine if the person*
25 *sought to be excluded is, in fact, a person excludable under this*
26 *section.*

27 (3) *Either party may challenge the exclusion of any person*
28 *under paragraph (2).*

29 (4) *Paragraph (2) does not apply to the investigating officer or*
30 *the investigator for the defendant, nor does it apply to officers*
31 *having custody of persons brought before the court.*

32 (d) If a search or seizure motion is granted pursuant to the
33 proceedings authorized by this section, the property or evidence
34 shall not be admissible against the movant at any trial or other
35 hearing unless further proceedings authorized by this section,
36 Section 871.5, 1238, or 1466 are utilized by the people.

37 (e) If a search or seizure motion is granted at a trial, the property
38 shall be returned upon order of the court unless it is otherwise
39 subject to lawful detention. If the motion is granted at a special
40 hearing, the property shall be returned upon order of the court only



1 if, after the conclusion of any further proceedings authorized by
2 this section, Section 1238 or 1466, the property is not subject to
3 lawful detention or if the time for initiating the proceedings has
4 expired, whichever occurs last. If the motion is granted at a
5 preliminary hearing, the property shall be returned upon order of
6 court after 10 days unless the property is otherwise subject to
7 lawful detention or unless, within that time, further proceedings
8 authorized by this section, Section 871.5 or 1238 are utilized; if
9 they are utilized, the property shall be returned only if, after the
10 conclusion of the proceedings, the property is no longer subject to
11 lawful detention.

12 (f) (1) If the property or evidence relates to a felony offense
13 initiated by a complaint, the motion shall be made in the superior
14 court only upon filing of an information, except that the defendant
15 may make the motion at the preliminary hearing in the municipal
16 court or in the superior court in a county in which there is no
17 municipal court, but the motion shall be restricted to evidence
18 sought to be introduced by the people at the preliminary hearing.

19 (2) The motion may be made at the preliminary examination
20 only if at least five court days before the date set for the preliminary
21 examination the defendant has filed and personally served on the
22 people a written motion accompanied by a memorandum of points
23 and authorities as required by paragraph (2) of subdivision (a). At
24 the preliminary examination, the magistrate may grant the
25 defendant a continuance for the purpose of filing the motion and
26 serving the motion upon the people, at least five court days before
27 resumption of the examination, upon a showing that the defendant
28 or his or her attorney of record was not aware of the evidence or
29 was not aware of the grounds for suppression before the
30 preliminary examination.

31 (3) Any written response by the people to the motion described
32 in paragraph (2) shall be filed with the court and personally served
33 on the defendant or his or her attorney of record at least two court
34 days prior to the hearing at which the motion is to be made.

35 (g) If the property or evidence relates to a misdemeanor
36 complaint, the motion shall be made in the municipal court or in
37 the superior court in a county in which there is no municipal court
38 before trial and heard prior to trial at a special hearing relating to
39 the validity of the search or seizure. If the property or evidence
40 relates to a misdemeanor filed together with a felony, the



1 procedure provided for a felony in this section and Sections 1238
2 and 1539 shall be applicable.

3 (h) If, prior to the trial of a felony or misdemeanor, opportunity
4 for this motion did not exist or the defendant was not aware of the
5 grounds for the motion, the defendant shall have the right to make
6 this motion during the course of trial in the municipal or superior
7 court.

8 (i) If the property or evidence obtained relates to a felony
9 offense initiated by complaint and the defendant was held to
10 answer at the preliminary hearing, or if the property or evidence
11 relates to a felony offense initiated by indictment, the defendant
12 shall have the right to renew or make the motion in the superior
13 court at a special hearing relating to the validity of the search or
14 seizure which shall be heard prior to trial and at least 10 court days
15 after notice to the people, unless the people are willing to waive a
16 portion of this time. Any written response by the people to the
17 motion shall be filed with the court and personally served on the
18 defendant or his or her attorney of record at least two court days
19 prior to the hearing, unless the defendant is willing to waive a
20 portion of this time. If the offense was initiated by indictment or
21 if the offense was initiated by complaint and no motion was made
22 at the preliminary hearing, the defendant shall have the right to
23 fully litigate the validity of a search or seizure on the basis of the
24 evidence presented at a special hearing. If the motion was made at
25 the preliminary hearing, unless otherwise agreed to by all parties,
26 evidence presented at the special hearing shall be limited to the
27 transcript of the preliminary hearing and to evidence that could not
28 reasonably have been presented at the preliminary hearing, except
29 that the people may recall witnesses who testified at the
30 preliminary hearing. If the people object to the presentation of
31 evidence at the special hearing on the grounds that the evidence
32 could reasonably have been presented at the preliminary hearing,
33 the defendant shall be entitled to an in camera hearing to determine
34 that issue. The superior court shall base its ruling on all evidence
35 presented at the special hearing and on the transcript of the
36 preliminary hearing, and the findings of the magistrate shall be
37 binding on the superior court as to evidence or property not
38 affected by evidence presented at the special hearing. After the
39 special hearing is held in the superior court, any review thereafter
40 desired by the defendant prior to trial shall be by means of an



1 extraordinary writ of mandate or prohibition filed within 30 days
2 after the denial of his or her motion at the special hearing.

3 (j) If the property or evidence relates to a felony offense
4 initiated by complaint and the defendant's motion for the return of
5 the property or suppression of the evidence at the preliminary
6 hearing is granted, and if the defendant is not held to answer at the
7 preliminary hearing, the people may file a new complaint or seek
8 an indictment after the preliminary hearing, and the ruling at the
9 prior hearing shall not be binding in any subsequent proceeding,
10 except as limited by subdivision (p). In the alternative, the people
11 may move to reinstate the complaint, or those parts of the
12 complaint for which the defendant was not held to answer,
13 pursuant to Section 871.5. If the property or evidence relates to a
14 felony offense initiated by complaint and the defendant's motion
15 for the return or suppression of the property or evidence at the
16 preliminary hearing is granted, and if the defendant is held to
17 answer at the preliminary hearing, the ruling at the preliminary
18 hearing shall be binding upon the people unless, upon notice to the
19 defendant and the court in which the preliminary hearing was held
20 and upon the filing of an information, the people, within 15 days
21 after the preliminary hearing, request in the superior court a special
22 hearing, in which case the validity of the search or seizure shall be
23 relitigated de novo on the basis of the evidence presented at the
24 special hearing, and the defendant shall be entitled, as a matter of
25 right, to a continuance of the special hearing for a period of time
26 up to 30 days. The people may not request relitigation of the
27 motion at a special hearing if the defendant's motion has been
28 granted twice. If the defendant's motion is granted at a special
29 hearing in the superior court, the people, if they have additional
30 evidence relating to the motion and not presented at the special
31 hearing, shall have the right to show good cause at the trial why the
32 evidence was not presented at the special hearing and why the prior
33 ruling at the special hearing should not be binding, or the people
34 may seek appellate review as provided in subdivision (o), unless
35 the court, prior to the time the review is sought, has dismissed the
36 case pursuant to Section 1385. If the case has been dismissed
37 pursuant to Section 1385, or if the people dismiss the case on their
38 own motion after the special hearing, the people may file a new
39 complaint or seek an indictment after the special hearing, and the
40 ruling at the special hearing shall not be binding in any subsequent



1 proceeding, except as limited by subdivision (p). If the property or
2 evidence seized relates solely to a misdemeanor complaint, and the
3 defendant made a motion for the return of property or the
4 suppression of evidence in the municipal court or superior court
5 in a county in which there is no municipal court prior to trial, both
6 the people and defendant shall have the right to appeal any decision
7 of that court relating to that motion to the superior court of the
8 county in which the municipal or superior court is located, in
9 accordance with the California Rules of Court provisions
10 governing appeals to the appellate division in criminal cases. If the
11 people prosecute review by appeal or writ to decision, or any
12 review thereof, in a felony or misdemeanor case, it shall be binding
13 upon them.

14 (k) If the defendant's motion to return property or suppress
15 evidence is granted and the case is dismissed pursuant to Section
16 1385, or the people appeal in a misdemeanor case pursuant to
17 subdivision (j), the defendant shall be released pursuant to Section
18 1318 if he or she is in custody and not returned to custody unless
19 the proceedings are resumed in the trial court and he or she is
20 lawfully ordered by the court to be returned to custody.

21 If the defendant's motion to return property or suppress
22 evidence is granted and the people file a petition for writ of
23 mandate or prohibition pursuant to subdivision (o) or a notice of
24 intention to file such a petition, the defendant shall be released
25 pursuant to Section 1318, unless (1) he or she is charged with a
26 capital offense in a case where the proof is evident and the
27 presumption great, or (2) he or she is charged with a noncapital
28 offense defined in Chapter 1 (commencing with Section 187) of
29 Title 8 of Part 1, and the court orders that the defendant be
30 discharged from actual custody upon bail.

31 (l) If the defendant's motion to return property or suppress
32 evidence is granted, the trial of a criminal case shall be stayed to
33 a specified date pending the termination in the appellate courts of
34 this state of the proceedings provided for in this section, Section
35 871.5, 1238, or 1466 and, except upon stipulation of the parties,
36 pending the time for the initiation of these proceedings. Upon the
37 termination of these proceedings, the defendant shall be brought
38 to trial as provided by Section 1382, and, subject to the provisions
39 of Section 1382, whenever the people have sought and been denied
40 appellate review pursuant to subdivision (o), the defendant shall



1 be entitled to have the action dismissed if he or she is not brought
2 to trial within 30 days of the date of the order that is the last denial
3 of the petition. Nothing contained in this subdivision shall prohibit
4 a court, at the same time as it rules upon the search and seizure
5 motion, from dismissing a case pursuant to Section 1385 when the
6 dismissal is upon the court's own motion and is based upon an
7 order at the special hearing granting the defendant's motion to
8 return property or suppress evidence. In a misdemeanor case, the
9 defendant shall be entitled to a continuance of up to 30 days if he
10 or she intends to file a motion to return property or suppress
11 evidence and needs this time to prepare for the special hearing on
12 the motion. In case of an appeal by the defendant in a misdemeanor
13 case from the denial of the motion, he or she shall be entitled to bail
14 as a matter of right, and, in the discretion of the trial or appellate
15 court, may be released on his or her own recognizance pursuant to
16 Section 1318.

17 (m) The proceedings provided for in this section, and Sections
18 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive
19 remedies prior to conviction to test the unreasonableness of a
20 search or seizure where the person making the motion for the
21 return of property or the suppression of evidence is a defendant in
22 a criminal case and the property or thing has been offered or will
23 be offered as evidence against him or her. A defendant may seek
24 further review of the validity of a search or seizure on appeal from
25 a conviction in a criminal case notwithstanding the fact that the
26 judgment of conviction is predicated upon a plea of guilty. Review
27 on appeal may be obtained by the defendant provided that at some
28 stage of the proceedings prior to conviction he or she has moved
29 for the return of property or the suppression of the evidence.

30 (n) This section establishes only the procedure for suppression
31 of evidence and return of property, and does not establish or alter
32 any substantive ground for suppression of evidence or return of
33 property. Nothing contained in this section shall prohibit a person
34 from making a motion, otherwise permitted by law, to return
35 property, brought on the ground that the property obtained is
36 protected by the free speech and press provisions of the United
37 States and California Constitutions. Nothing in this section shall
38 be construed as altering (1) the law of standing to raise the issue
39 of an unreasonable search or seizure; (2) the law relating to the
40 status of the person conducting the search or seizure; (3) the law



1 relating to the burden of proof regarding the search or seizure; (4)
2 the law relating to the reasonableness of a search or seizure
3 regardless of any warrant that may have been utilized; or (5) the
4 procedure and law relating to a motion made pursuant to Section
5 871.5 or 995, or the procedures that may be initiated after the
6 granting or denial of such a motion.

7 (o) Within 30 days after a defendant's motion is granted at a
8 special hearing in the superior court in a felony case, the people
9 may file a petition for writ of mandate or prohibition in the court
10 of appeal, seeking appellate review of the ruling regarding the
11 search or seizure motion. If the trial of a criminal case is set for a
12 date that is less than 30 days from the granting of a defendant's
13 motion at a special hearing in the superior court in a felony case,
14 the people, if they have not filed such a petition and wish to
15 preserve their right to file a petition, shall file in the superior court
16 on or before the trial date or within 10 days after the special
17 hearing, whichever occurs last, a notice of intention to file a
18 petition and shall serve a copy of the notice upon the defendant.

19 (p) If a defendant's motion to return property or suppress
20 evidence in a felony matter has been granted twice, the people may
21 not file a new complaint or seek an indictment in order to relitigate
22 the motion or relitigate the matter de novo at a special hearing in
23 the superior court as otherwise provided by subdivision (j), unless
24 the people discover additional evidence relating to the motion that
25 was not reasonably discoverable at the time of the second
26 suppression hearing. Relitigation of the motion shall be heard by
27 the same judge who granted the motion at the first hearing if the
28 judge is available.

29 (q) The amendments to this section enacted in the 1997 portion
30 of the 1997–98 Regular Session of the Legislature shall apply to
31 all criminal proceedings conducted on or after January 1, 1998.

32 ~~amended to read:~~

33 ~~1013a. Proof of service by mail may be made by one of the~~
34 ~~following methods:~~

35 ~~(a) An affidavit setting forth the exact title of the document~~
36 ~~served and filed in the cause, showing the name and residence or~~
37 ~~business address of the person making the service, showing that he~~
38 ~~or she is a resident of or employed in the county where the mailing~~
39 ~~occurs, that he or she is over the age of 18 years and not a party to~~
40 ~~the cause, and showing the date and place of deposit in the mail;~~



1 ~~the name and address of the person served as shown on the~~
2 ~~envelope, and also showing that the envelope was sealed and~~
3 ~~deposited in the mail with the postage thereon fully prepaid.~~

4 ~~(b) A certificate setting forth the exact title of the document~~
5 ~~served and filed in the cause, showing the name and business~~
6 ~~address of the person making the service, showing that he or she~~
7 ~~is an active member of the State Bar of California and is not a party~~
8 ~~to the cause, and showing the date and place of deposit in the mail,~~
9 ~~the name and address of the person served as shown on the~~
10 ~~envelope, and also showing that the envelope was sealed and~~
11 ~~deposited in the mail with the postage thereon fully prepaid.~~

12 ~~(c) An affidavit setting forth the exact title of the document~~
13 ~~served and filed in the cause, showing (A) the name and residence~~
14 ~~or business address of the person making the service, (B) that he~~
15 ~~or she is a resident of, or employed in, the county where the mailing~~
16 ~~occurs, (C) that he or she is over the age of 18 years and not a party~~
17 ~~to the cause, (D) that he or she is readily familiar with the business²~~
18 ~~practice for collection and processing of correspondence for~~
19 ~~mailing with the United States Postal Service, (E) that the~~
20 ~~correspondence would be deposited with the United States Postal~~
21 ~~Service that same day in the ordinary course of business, (F) the~~
22 ~~name and address of the person served as shown on the envelope,~~
23 ~~and the date and place of business where the correspondence was~~
24 ~~placed for deposit in the United States Postal Service, and (G) that~~
25 ~~the envelope was sealed and placed for collection and mailing on~~
26 ~~that date following ordinary business practices. Service made~~
27 ~~pursuant to this paragraph, upon motion of a party served, shall be~~
28 ~~presumed invalid if the postal cancellation date or postage meter~~
29 ~~date on the envelope is more than one day after the date of deposit~~
30 ~~for mailing contained in the affidavit.~~

31 ~~(d) In case of service by the clerk of a court of record, a~~
32 ~~certificate by that clerk setting forth the exact title of the document~~
33 ~~served and filed in the cause, showing the name of the clerk and~~
34 ~~the name of the court of which he or she is the clerk, and that he~~
35 ~~or she is not a party to the cause, and showing the date and place~~
36 ~~of deposit in the mail, the name and address of the person served~~
37 ~~as shown on the envelope, and also showing that the envelope was~~
38 ~~sealed and deposited in the mail with the postage thereon fully~~
39 ~~prepaid. This form of proof is sufficient for service of process in~~
40 ~~which the clerk or deputy clerk signing the certificate places the~~



1 document for collection and mailing on the date shown thereon, so
2 as to cause it to be mailed in an envelope so sealed and so addressed
3 on that date following standard court practices. Service made
4 pursuant to this paragraph, upon motion of a party served and a
5 finding of good cause by the court, shall be deemed to have
6 occurred on the date of postage cancellation or postage meter
7 imprint as shown on the envelope if that date is more than one day
8 after the date of deposit for mailing contained in the certificate. In
9 unlawful detainer cases, responsive pleadings shall be served by
10 the clerk if the defendant provides the clerk with a copy of the
11 pleading and a preaddressed envelope with first-class postage
12 prepaid.

13 ~~SEC. 2. Notwithstanding Section 17610 of the Government~~
14 ~~Code, if the Commission on State Mandates determines that this~~
15 ~~act contains costs mandated by the state, reimbursement to local~~
16 ~~agencies and school districts for those costs shall be made pursuant~~
17 ~~to Part 7 (commencing with Section 17500) of Division 4 of Title~~
18 ~~2 of the Government Code. If the statewide cost of the claim for~~
19 ~~reimbursement does not exceed one million dollars (\$1,000,000),~~
20 ~~reimbursement shall be made from the State Mandates Claims~~
21 ~~Fund.~~

