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AMENDED IN SENATE JUNE 13, 2002  
AMENDED IN SENATE MARCH 11, 2002  
AMENDED IN SENATE FEBRUARY 25, 2002  
AMENDED IN ASSEMBLY MARCH 27, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1590**

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**Introduced by Assembly Member Simitian**

February 23, 2001

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An act to amend Section 1538.5 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 1590, as amended, Simitian. 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. *The bill would also make various technical changes.*

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

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

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

3 1538.5. (a) (1) A defendant may move for the return of  
4 property or to suppress as evidence any tangible or intangible thing  
5 obtained as a result of a search or seizure on either of the following  
6 grounds:

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

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

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

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

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

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

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

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

25 (b) When consistent with the procedures set forth in this section  
26 and subject to the provisions of ~~Section~~ Sections 170 to 170.6,  
27 inclusive, of the Code of Civil Procedure, the motion should first  
28 be heard by the magistrate who issued the search warrant if there  
29 is a warrant.

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



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

4 (A) Exclude all potential and actual witnesses who have not  
5 been examined.

6 (B) Order the witnesses not to converse with each other until  
7 they are all examined.

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

10 (D) Hold a hearing, on the record, to determine if the person  
11 sought to be excluded is, in fact, a person excludable under this  
12 section.

13 (3) Either party may challenge the exclusion of any person  
14 under paragraph (2).

15 (4) Paragraph (2) does not apply to the investigating officer or  
16 the investigator for the defendant, nor does it apply to officers  
17 having custody of persons brought before the court. ~~is under~~  
18 ~~investigation.~~

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

24 (e) If a search or seizure motion is granted at a trial, the property  
25 shall be returned upon order of the court unless it is otherwise  
26 subject to lawful detention. If the motion is granted at a special  
27 hearing, the property shall be returned upon order of the court only  
28 if, after the conclusion of any further proceedings authorized by  
29 this section, Section 1238 or 1466, the property is not subject to  
30 lawful detention or if the time for initiating the proceedings has  
31 expired, whichever occurs last. If the motion is granted at a  
32 preliminary hearing, the property shall be returned upon order of  
33 the court after 10 days unless the property is otherwise subject to  
34 lawful detention or unless, within that time, further proceedings  
35 authorized by this section, Section 871.5 or 1238 are utilized; if  
36 they are utilized, the property shall be returned only if, after the  
37 conclusion of the proceedings, the property is no longer subject to  
38 lawful detention.

39 (f) (1) If the property or evidence relates to a felony offense  
40 initiated by a complaint, the motion shall be made ~~in the superior~~



1 ~~court~~ only upon filing of an information, except that the defendant  
2 may make the motion at the preliminary hearing ~~in the municipal~~  
3 ~~court or in the superior court in a county in which there is no~~  
4 ~~municipal court~~, but the motion shall be restricted to evidence  
5 sought to be introduced by the people at the preliminary hearing.

6 (2) The motion may be made at the preliminary examination  
7 only if, at least five court days before the date set for the  
8 preliminary examination, the defendant has filed and personally  
9 served on the people a written motion accompanied by a  
10 memorandum of points and authorities as required by paragraph  
11 (2) of subdivision (a). At the preliminary examination, the  
12 magistrate may grant the defendant a continuance for the purpose  
13 of filing the motion and serving the motion upon the people, at  
14 least five court days before resumption of the examination, upon  
15 a showing that the defendant or his or her attorney of record was  
16 not aware of the evidence or was not aware of the grounds for  
17 suppression before the preliminary examination.

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

22 (g) If the property or evidence relates to a misdemeanor  
23 complaint, the motion shall be made ~~in the municipal court or in~~  
24 ~~the superior court in a county in which there is no municipal court~~  
25 before trial and heard prior to trial at a special hearing relating to  
26 the validity of the search or seizure. If the property or evidence  
27 relates to a misdemeanor filed together with a felony, the  
28 procedure provided for a felony in this section and Sections 1238  
29 and 1539 shall be applicable.

30 (h) If, prior to the trial of a felony or misdemeanor, opportunity  
31 for this motion did not exist or the defendant was not aware of the  
32 grounds for the motion, the defendant shall have the right to make  
33 this motion during the course of trial ~~in the municipal or superior~~  
34 ~~court~~.

35 (i) If the property or evidence obtained relates to a felony  
36 offense initiated by complaint and the defendant was held to  
37 answer at the preliminary hearing, or if the property or evidence  
38 relates to a felony offense initiated by indictment, the defendant  
39 shall have the right to renew or make the motion ~~in the superior~~  
40 ~~court~~ at a special hearing relating to the validity of the search or



1 seizure which shall be heard prior to trial and at least 10 court days  
2 after notice to the people, unless the people are willing to waive a  
3 portion of this time. Any written response by the people to the  
4 motion shall be filed with the court and personally served on the  
5 defendant or his or her attorney of record at least two court days  
6 prior to the hearing, unless the defendant is willing to waive a  
7 portion of this time. If the offense was initiated by indictment or  
8 if the offense was initiated by complaint and no motion was made  
9 at the preliminary hearing, the defendant shall have the right to  
10 fully litigate the validity of a search or seizure on the basis of the  
11 evidence presented at a special hearing. If the motion was made at  
12 the preliminary hearing, unless otherwise agreed to by all parties,  
13 evidence presented at the special hearing shall be limited to the  
14 transcript of the preliminary hearing and to evidence that could not  
15 reasonably have been presented at the preliminary hearing, except  
16 that the people may recall witnesses who testified at the  
17 preliminary hearing. If the people object to the presentation of  
18 evidence at the special hearing on the grounds that the evidence  
19 could reasonably have been presented at the preliminary hearing,  
20 the defendant shall be entitled to an in camera hearing to determine  
21 that issue. The ~~superior~~ court shall base its ruling on all evidence  
22 presented at the special hearing and on the transcript of the  
23 preliminary hearing, and the findings of the magistrate shall be  
24 binding on the ~~superior~~ court as to evidence or property not  
25 affected by evidence presented at the special hearing. After the  
26 special hearing is held ~~in the superior court~~, any review thereafter  
27 desired by the defendant prior to trial shall be by means of an  
28 extraordinary writ of mandate or prohibition filed within 30 days  
29 after the denial of his or her motion at the special hearing.

30 (j) If the property or evidence relates to a felony offense  
31 initiated by complaint and the defendant's motion for the return of  
32 the property or suppression of the evidence at the preliminary  
33 hearing is granted, and if the defendant is not held to answer at the  
34 preliminary hearing, the people may file a new complaint or seek  
35 an indictment after the preliminary hearing, and the ruling at the  
36 prior hearing shall not be binding in any subsequent proceeding,  
37 except as limited by subdivision (p). In the alternative, the people  
38 may move to reinstate the complaint, or those parts of the  
39 complaint for which the defendant was not held to answer,  
40 pursuant to Section 871.5. If the property or evidence relates to a



1 felony offense initiated by complaint and the defendant's motion  
2 for the return or suppression of the property or evidence at the  
3 preliminary hearing is granted, and if the defendant is held to  
4 answer at the preliminary hearing, the ruling at the preliminary  
5 hearing shall be binding upon the people unless, upon notice to the  
6 defendant and the court in which the preliminary hearing was held  
7 and upon the filing of an information, the people, within 15 days  
8 after the preliminary hearing, request ~~in the superior court~~ a special  
9 hearing, in which case the validity of the search or seizure shall be  
10 relitigated de novo on the basis of the evidence presented at the  
11 special hearing, and the defendant shall be entitled, as a matter of  
12 right, to a continuance of the special hearing for a period of time  
13 up to 30 days. The people may not request relitigation of the  
14 motion at a special hearing if the defendant's motion has been  
15 granted twice. If the defendant's motion is granted at a special  
16 hearing ~~in the superior court~~, the people, if they have additional  
17 evidence relating to the motion and not presented at the special  
18 hearing, shall have the right to show good cause at the trial why the  
19 evidence was not presented at the special hearing and why the prior  
20 ruling at the special hearing should not be binding, or the people  
21 may seek appellate review as provided in subdivision (o), unless  
22 the court, prior to the time the review is sought, has dismissed the  
23 case pursuant to Section 1385. If the case has been dismissed  
24 pursuant to Section 1385, or if the people dismiss the case on their  
25 own motion after the special hearing, the people may file a new  
26 complaint or seek an indictment after the special hearing, and the  
27 ruling at the special hearing shall not be binding in any subsequent  
28 proceeding, except as limited by subdivision (p). If the property or  
29 evidence seized relates solely to a misdemeanor complaint, and the  
30 defendant made a motion for the return of property or the  
31 suppression of evidence in the ~~municipal court or superior court~~  
32 ~~in a county in which there is no municipal court~~ prior to trial, both  
33 the people and defendant shall have the right to appeal any decision  
34 of that court relating to that motion to the ~~superior court of the~~  
35 ~~county in which the municipal or superior court is located~~  
36 *appellate division*, in accordance with the California Rules of  
37 Court provisions governing appeals to the appellate division in  
38 criminal cases. If the people prosecute review by appeal or writ to  
39 decision, or any review thereof, in a felony or misdemeanor case,  
40 it shall be binding upon them.



1 (k) If the defendant's motion to return property or suppress  
2 evidence is granted and the case is dismissed pursuant to Section  
3 1385, or the people appeal in a misdemeanor case pursuant to  
4 subdivision (j), the defendant shall be released pursuant to Section  
5 1318 if he or she is in custody and not returned to custody unless  
6 the proceedings are resumed in the trial court and he or she is  
7 lawfully ordered by the court to be returned to custody.

8 If the defendant's motion to return property or suppress  
9 evidence is granted and the people file a petition for writ of  
10 mandate or prohibition pursuant to subdivision (o) or a notice of  
11 intention to file a petition, the defendant shall be released pursuant  
12 to Section 1318, unless (1) he or she is charged with a capital  
13 offense in a case where the proof is evident and the presumption  
14 great, or (2) he or she is charged with a noncapital offense defined  
15 in Chapter 1 (commencing with Section 187) of Title 8 of Part 1,  
16 and the court orders that the defendant be discharged from actual  
17 custody upon bail.

18 (l) If the defendant's motion to return property or suppress  
19 evidence is granted, the trial of a criminal case shall be stayed to  
20 a specified date pending the termination in the appellate courts of  
21 this state of the proceedings provided for in this section, Section  
22 871.5, 1238, or 1466 and, except upon stipulation of the parties,  
23 pending the time for the initiation of these proceedings. Upon the  
24 termination of these proceedings, the defendant shall be brought  
25 to trial as provided by Section 1382, and, subject to the provisions  
26 of Section 1382, whenever the people have sought and been denied  
27 appellate review pursuant to subdivision (o), the defendant shall  
28 be entitled to have the action dismissed if he or she is not brought  
29 to trial within 30 days of the date of the order that is the last denial  
30 of the petition. Nothing contained in this subdivision shall prohibit  
31 a court, at the same time as it rules upon the search and seizure  
32 motion, from dismissing a case pursuant to Section 1385 when the  
33 dismissal is upon the court's own motion and is based upon an  
34 order at the special hearing granting the defendant's motion to  
35 return property or suppress evidence. In a misdemeanor case, the  
36 defendant shall be entitled to a continuance of up to 30 days if he  
37 or she intends to file a motion to return property or suppress  
38 evidence and needs this time to prepare for the special hearing on  
39 the motion. In case of an appeal by the defendant in a misdemeanor  
40 case from the denial of the motion, he or she shall be entitled to bail



1 as a matter of right, and, in the discretion of the trial or appellate  
2 court, may be released on his or her own recognizance pursuant to  
3 Section 1318. In the case of an appeal by the defendant in a  
4 misdemeanor case from the denial of the motion, the trial court  
5 may, in its discretion, order or deny a stay of further proceedings  
6 pending disposition of the appeal.

7 (m) The proceedings provided for in this section, and Sections  
8 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive  
9 remedies prior to conviction to test the unreasonableness of a  
10 search or seizure where the person making the motion for the  
11 return of property or the suppression of evidence is a defendant in  
12 a criminal case and the property or thing has been offered or will  
13 be offered as evidence against him or her. A defendant may seek  
14 further review of the validity of a search or seizure on appeal from  
15 a conviction in a criminal case notwithstanding the fact that the  
16 judgment of conviction is predicated upon a plea of guilty. Review  
17 on appeal may be obtained by the defendant provided that at some  
18 stage of the proceedings prior to conviction he or she has moved  
19 for the return of property or the suppression of the evidence.

20 (n) This section establishes only the procedure for suppression  
21 of evidence and return of property, and does not establish or alter  
22 any substantive ground for suppression of evidence or return of  
23 property. Nothing contained in this section shall prohibit a person  
24 from making a motion, otherwise permitted by law, to return  
25 property, brought on the ground that the property obtained is  
26 protected by the free speech and press provisions of the United  
27 States and California Constitutions. Nothing in this section shall  
28 be construed as altering (1) the law of standing to raise the issue  
29 of an unreasonable search or seizure; (2) the law relating to the  
30 status of the person conducting the search or seizure; (3) the law  
31 relating to the burden of proof regarding the search or seizure; (4)  
32 the law relating to the reasonableness of a search or seizure  
33 regardless of any warrant that may have been utilized; or (5) the  
34 procedure and law relating to a motion made pursuant to Section  
35 871.5 or 995, or the procedures that may be initiated after the  
36 granting or denial of a motion.

37 (o) Within 30 days after a defendant's motion is granted at a  
38 special hearing ~~in the superior court~~ in a felony case, the people  
39 may file a petition for writ of mandate or prohibition in the court  
40 of appeal, seeking appellate review of the ruling regarding the





1 search or seizure motion. If the trial of a criminal case is set for a  
2 date that is less than 30 days from the granting of a defendant's  
3 motion at a special hearing ~~in the superior court~~ in a felony case,  
4 the people, if they have not filed a petition and wish to preserve  
5 their right to file a petition, shall file in the superior court on or  
6 before the trial date or within 10 days after the special hearing,  
7 whichever occurs last, a notice of intention to file a petition and  
8 shall serve a copy of the notice upon the defendant.

9 (p) If a defendant's motion to return property or suppress  
10 evidence in a felony matter has been granted twice, the people may  
11 not file a new complaint or seek an indictment in order to relitigate  
12 the motion or relitigate the matter de novo at a special hearing ~~in~~  
13 ~~the superior court~~ as otherwise provided by subdivision (j), unless  
14 the people discover additional evidence relating to the motion that  
15 was not reasonably discoverable at the time of the second  
16 suppression hearing. Relitigation of the motion shall be heard by  
17 the same judge who granted the motion at the first hearing if the  
18 judge is available.

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

