

AMENDED IN ASSEMBLY JULY 8, 1997
AMENDED IN ASSEMBLY JUNE 16, 1997
AMENDED IN SENATE MAY 19, 1997
AMENDED IN SENATE APRIL 24, 1997

SENATE BILL

No. 123

Introduced by Senator Peace

January 8, 1997

An act to amend Sections 817, 861, and 1538.5 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

SB 123, as amended, Peace. Criminal procedure.

(1) Under existing law, a defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure based on specified grounds, including the ground that the search or seizure without a warrant was unreasonable. Existing law permits the motion to be heard at a preliminary hearing, a special hearing, or at a trial, as specified.

This bill would require the motion to be made in writing and accompanied by a memorandum of points and authorities and proof of service. The bill also would require the defendant, with respect to a motion made at the preliminary examination, to file and personally serve on the people the written motion and memorandum of points and authorities at least 5 court days before the date set for the preliminary examination. This bill would additionally authorize the

magistrate, at the preliminary hearing, to grant the defendant a continuance to file and serve the motion upon a specified showing.

(2) Existing law provides that the preliminary examination shall be completed at one session unless the magistrate postpones it for good cause, but the postponement shall not be for more than 10 court days unless the defendant personally waives his or her right to a continuous preliminary hearing or the prosecution establishes good cause.

This bill would provide that a request for a continuance of the preliminary hearing by the defendant or his or her attorney of record shall be deemed a personal waiver of the defendant’s right to a continuous preliminary examination.

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 817 of the Penal Code is
2 amended to read:

3 817. (a) (1) When a declaration of probable cause is
4 made by a peace officer of this state, in accordance with
5 subdivision (b) or (c), the magistrate, if, and only if,
6 satisfied from the declaration that there exists probable
7 cause that the offense described in the declaration has
8 been committed and that the defendant described
9 therein has committed the offense, shall issue a warrant
10 of probable cause for the arrest of the defendant.

11 (2) The warrant of probable cause for arrest shall not
12 begin a complaint process pursuant to Section 740 or 813.
13 The warrant of probable cause for arrest shall have the
14 same authority for service as set forth in Section 840 and
15 the same time limitations as that of an arrest warrant
16 issued pursuant to Section 813.

17 (b) The declaration in support of the warrant of
18 probable cause for arrest shall be a sworn statement made
19 in writing.

20 (c) In lieu of the written declaration required in
21 subdivision (b), the magistrate may take an oral



1 statement under oath under either of the following
2 conditions:

3 (1) The oath shall be taken under penalty of perjury
4 and recorded and transcribed. The transcribed statement
5 shall be deemed to be the declaration for the purposes of
6 this section. The recording of the sworn oral statement
7 and the transcribed statement shall be certified by the
8 magistrate receiving it and shall be filed with the clerk of
9 the court. In the alternative, the sworn oral statement
10 may be recorded by a certified court reporter who shall
11 certify the transcript of the statement, after which the
12 magistrate receiving it shall certify the transcript, which
13 shall be filed with the clerk of the court.

14 (2) The oath is made using telephone and facsimile
15 transmission equipment, under all of the following
16 conditions:

17 (A) The oath is made during a telephone conversation
18 with the magistrate, after which the declarant shall sign
19 his or her declaration in support of the warrant of
20 probable cause for arrest. The proposed warrant and all
21 supporting declarations and attachments shall then be
22 transmitted to the magistrate utilizing facsimile
23 transmission equipment.

24 (B) The magistrate shall confirm with the declarant
25 the receipt of the warrant and the supporting
26 declarations and attachments. The magistrate shall verify
27 that all the pages sent have been received, that all pages
28 are legible, and that the declarant's signature is
29 acknowledged as genuine.

30 (C) If the magistrate decides to issue the warrant, he
31 or she shall sign the warrant, note on the warrant the
32 exact date and time of the issuance of the warrant, and
33 indicate on the warrant that the oath of the declarant was
34 administered orally over the telephone. The completed
35 warrant, as signed by the magistrate, shall be deemed to
36 be the original warrant.

37 (D) The magistrate shall transmit via facsimile
38 transmission equipment the signed warrant to the
39 declarant who shall telephonically acknowledge its
40 receipt. The magistrate shall then telephonically



1 authorize the declarant to write the words “duplicate
2 original” on the copy of the completed warrant
3 transmitted to the declarant and this document shall be
4 deemed to be a duplicate original warrant.

5 (d) Before issuing a warrant, the magistrate may
6 examine under oath the person seeking the warrant and
7 any witness the person may produce, take the written
8 declaration of the person or witness, and cause the person
9 or witness to subscribe the declaration.

10 (e) A warrant of probable cause for arrest shall contain
11 the information required pursuant to Sections 815 and
12 815a.

13 (f) A warrant of probable cause for arrest may be in
14 substantially the following form:

15
16 County of _____, State of California.

17
18 The people of the State of California to any peace officer of the
19 STATE:

20
21 Proof by declaration under penalty of perjury having been made
22 this day to me by _____,
23 (name of affiant)

24
25 I find that there is probable cause to believe that the crime(s)
26 of _____
27 (designate the crime/s)

28 has (have) been committed by the defendant named and
29 described below.

30
31 Therefore, you are commanded to arrest
32 _____ and to bring the defendant
33 (name of defendant)
34 before any magistrate in _____ County pursuant to Sections
35 821, 825, 826, and 848 of the Penal Code.

36
37 Defendant is admitted to bail in the amount of _____ dollars
38 (\$_____).



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Time Issued: _____

(Signature of the Judge)

Dated: _____ Judge of the _____ Court

(g) An original warrant of probable cause for arrest or the duplicate original warrant of probable cause for arrest shall be sufficient for booking a defendant into custody.

(h) Once the defendant named in the warrant of probable cause for arrest has been taken into custody, the agency which obtained the warrant shall file a “certificate of service” with the clerk of the issuing court. The certificate of service shall contain all of the following:

- (1) The date and time of service.
- (2) The name of the defendant arrested.
- (3) The location of the arrest.
- (4) The location where the defendant was incarcerated.

SEC. 2. Section 861 of the Penal Code is amended to read:

861. (a) The preliminary examination shall be completed at one session or the complaint shall be dismissed, unless the magistrate, for good cause shown by affidavit, postpones it. The postponement shall not be for more than 10 court days, unless either of the following occur:

- (1) The defendant personally waives his or her right to a continuous preliminary examination.
- (2) The prosecution establishes good cause for a postponement beyond the 10-court-day period. If the magistrate postpones the preliminary examination beyond the 10-court-day period, and the defendant is in custody, the defendant shall be released pursuant to subdivision (b) of Section 859b.

(b) The preliminary examination shall not be postponed beyond 60 days from the date the motion to postpone the examination is granted, unless by consent or on motion of the defendant.

(c) Nothing in this section shall preclude the magistrate from interrupting the preliminary



1 examination to conduct brief court matters so long as a
2 substantial majority of the court's time is devoted to the
3 preliminary examination.

4 (d) A request for a continuance of the preliminary
5 examination that is made by the defendant or his or her
6 attorney of record for the purpose of filing a motion
7 pursuant to paragraph (2) of subdivision (f) of Section
8 1538.5 shall be deemed a personal waiver of the
9 defendant's right to a continuous preliminary
10 examination.

11 SEC. 3. Section 1538.5 of the Penal Code is amended
12 to read:

13 1538.5. (a) (1) A defendant may move for the return
14 of property or to suppress as evidence any tangible or
15 intangible thing obtained as a result of a search or seizure
16 on either of the following grounds:

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

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

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

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

24 (iii) There was not probable cause for the issuance of
25 the warrant.

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

28 (v) There was any other violation of federal or state
29 constitutional standards.

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

37 (b) When consistent with the procedures set forth in
38 this section and subject to the provisions of Section 170 to
39 170.6, inclusive, of the Code of Civil Procedure, the



1 motion should first be heard by the magistrate who issued
2 the search warrant if there is a warrant.

3 (c) Whenever a search or seizure motion is made in
4 the municipal or superior court as provided in this
5 section, the judge or magistrate shall receive evidence on
6 any issue of fact necessary to determine the motion.

7 (d) If a search or seizure motion is granted pursuant
8 to the proceedings authorized by this section, the
9 property or evidence shall not be admissible against the
10 movant at any trial or other hearing unless further
11 proceedings authorized by this section, Section 871.5,
12 1238, or 1466 are utilized by the people.

13 (e) If a search or seizure motion is granted at a trial,
14 the property shall be returned upon order of the court
15 unless it is otherwise subject to lawful detention. If the
16 motion is granted at a special hearing, the property shall
17 be returned upon order of the court only if, after the
18 conclusion of any further proceedings authorized by this
19 section, Section 1238 or 1466, the property is not subject
20 to lawful detention or if the time for initiating the
21 proceedings has expired, whichever occurs last. If the
22 motion is granted at a preliminary hearing, the property
23 shall be returned upon order of court after 10 days unless
24 the property is otherwise subject to lawful detention or
25 unless, within that time, further proceedings authorized
26 by this section, Section 871.5 or 1238 are utilized; if they
27 are utilized, the property shall be returned only if, after
28 the conclusion of the proceedings, the property is no
29 longer subject to lawful detention.

30 (f) (1) If the property or evidence relates to a felony
31 offense initiated by a complaint, the motion shall be made
32 in the superior court only upon filing of an information,
33 except that the defendant may make the motion at the
34 preliminary hearing in the municipal court, but the
35 motion in the municipal court shall be restricted to
36 evidence sought to be introduced by the people at the
37 preliminary hearing.

38 (2) The motion may be made at the preliminary
39 examination only if at least five court days before the date
40 set for the preliminary examination the defendant has



1 filed and personally served on the people a written
2 motion accompanied by a memorandum of points and
3 authorities as required by paragraph (2) of subdivision
4 (a). At the preliminary examination, the magistrate may
5 grant the defendant a continuance for the purpose of
6 filing the motion and serving the motion upon the people,
7 at least five court days before resumption of the
8 examination, upon a showing that the defendant or his or
9 her attorney of record was not aware of the evidence or
10 was not aware of the grounds for suppression before the
11 preliminary examination.

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

17 (g) If the property or evidence relates to a
18 misdemeanor complaint, the motion shall be made in the
19 municipal court before trial and heard prior to trial at a
20 special hearing relating to the validity of the search or
21 seizure. If the property or evidence relates to a
22 misdemeanor filed together with a felony, the procedure
23 provided for a felony in this section and Sections 1238 and
24 1539 shall be applicable.

25 (h) If, prior to the trial of a felony or misdemeanor,
26 opportunity for this motion did not exist or the defendant
27 was not aware of the grounds for the motion, the
28 defendant shall have the right to make this motion during
29 the course of trial in the municipal or superior court.

30 (i) If the property or evidence obtained relates to a
31 felony offense initiated by complaint and the defendant
32 was held to answer at the preliminary hearing, or if the
33 property or evidence relates to a felony offense initiated
34 by indictment, the defendant shall have the right to
35 renew or make the motion in the superior court at a
36 special hearing relating to the validity of the search or
37 seizure which shall be heard prior to trial and at least 10
38 court days after notice to the people, unless the people
39 are willing to waive a portion of this time. Any written
40 response by the people to the motion shall be filed with



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

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



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



1 people and defendant shall have the right to appeal any
2 decision of that court relating to that motion to the
3 superior court of the county in which the municipal court
4 is located, in accordance with the California Rules of
5 Court provisions governing appeals from municipal
6 courts in criminal cases. If the people prosecute review by
7 appeal or writ to decision, or any review thereof, in a
8 felony or misdemeanor case, it shall be binding upon
9 them.

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

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

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



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

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

36 (n) This section establishes only the procedure for
37 suppression of evidence and return of property, and does
38 not establish or alter any substantive ground for
39 suppression of evidence or return of property. Nothing
40 contained in this section shall prohibit a person from



1 making a motion, otherwise permitted by law, to return
2 property, brought on the ground that the property
3 obtained is protected by the free speech and press
4 provisions of the United States and California
5 Constitutions. Nothing in this section shall be construed
6 as altering (1) the law of standing to raise the issue of an
7 unreasonable search or seizure; (2) the law relating to the
8 status of the person conducting the search or seizure; (3)
9 the law relating to the burden of proof regarding the
10 search or seizure; (4) the law relating to the
11 reasonableness of a search or seizure regardless of any
12 warrant that may have been utilized; or (5) the
13 procedure and law relating to a motion made pursuant to
14 Section 871.5 or 995, or the procedures that may be
15 initiated after the granting or denial of such a motion.

16 (o) Within 30 days after a defendant's motion is
17 granted at a special hearing in the superior court, the
18 people may file a petition for writ of mandate or
19 prohibition, seeking appellate review of the ruling
20 regarding the search or seizure motion. If the trial of a
21 criminal case is set for a date that is less than 30 days from
22 the granting of a defendant's motion at a special hearing
23 in the superior court, the people, if they have not filed
24 such a petition and wish to preserve their right to file a
25 petition, shall file in the superior court on or before the
26 trial date or within 10 days after the special hearing,
27 whichever occurs last, a notice of intention to file a
28 petition and shall serve a copy of the notice upon the
29 defendant.

30 (p) If a defendant's motion to return property or
31 suppress evidence in a felony matter has been granted
32 twice, the people may not file a new complaint or seek an
33 indictment in order to relitigate the motion or relitigate
34 the matter de novo at a special hearing in the superior
35 court as otherwise provided by subdivision (j), unless the
36 people discover additional evidence relating to the
37 motion that was not reasonably discoverable at the time
38 of the second suppression hearing. Relitigation of the
39 motion shall be heard by the same judge who granted the
40 motion at the first hearing if the judge is available.



1 (q) The amendments to this section enacted in the
2 1997 portion of the 1997–98 Regular Session of the
3 Legislature shall apply to all criminal proceedings
4 conducted on or after January 1, 1998.

5 SEC. 4. The Legislature finds and declares that
6 Section 1 of this act, which amends Section 817 of the
7 Penal Code, is declaratory of existing law.

8 *SEC. 5. Nothing in this act shall be construed to*
9 *abrogate the holding in Badillo v. Superior Court (1956),*
10 *46 Cal. 2d 269, that the people bear the burden of proving*
11 *that a search or seizure without a warrant is valid.*

