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SUPREME COURT
FILED

JUN 12 2015

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ADAM SERGIO RODRIGUEZ, Defendant and Appellant.	No. S223129 Court of Appeal No. H038588 (Santa Clara County Superior Court No. C111340) **MOTION FOR JUDICIAL NOTICE**

MOTION FOR JUDICIAL NOTICE

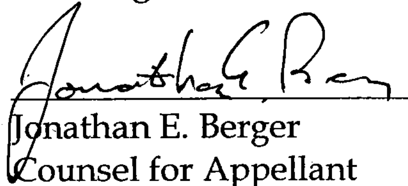
TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to rule 8.252 of the California Rules of Court, and to Evidence Code sections 452 and 459, appellant Adam Sergio Rodriguez, by and through his attorney Jonathan E. Berger, respectfully requests that this Court take judicial notice of a legislative-history document prepared by Legislative Research & Intent, LLC, and of the local rules of the Santa Clara County Superior Court, as they relate to the issues set forth in the Opening Brief on the Merits

which is filed and served contemporaneously herewith. Copies of the two documents are attached hereto as Exhibits A and B.

This motion is based on the following Memorandum of Points and Authorities and Declaration of Jonathan E. Berger.

Dated: June 11, 2015 Sebastopol, CA

Signature: 
Jonathan E. Berger
Counsel for Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

I. Procedural background

Appellant's first suppression motion was denied at his preliminary hearing. He then filed a renewed suppression motion to be heard at a special hearing in felony court. That motion was granted, whereupon the prosecution dismissed and re-filed the case.

Over the course of the next eleven months, appellant made repeated attempts to have a new suppression motion heard by the judge who had granted the motion in the first case, pursuant to the requirement set forth in Penal Code section 1538.5, subdivision (p) (hereafter "PC § 1538.5(p)") that after the dismissal and re-filing of a case, "Relitigation of the [suppression] motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available." Appellant was stymied in these attempts by the holding of the presiding judge of the Santa Clara County Superior Court that the judge who had granted the suppression motion

was "unavailable" because he had been assigned to a different courthouse. However, that "unavailable" judge presided over appellant's court trial and subsequent sentencing. In a published opinion, the Sixth District Court of Appeal affirmed appellant's conviction on the basis that "the presiding judge has discretion to manage the court calendar and assign matters to various divisions and judges across the courts of the county." (*People v. Rodriguez* (2014) 231 Cal.App.4th 288, 301.)

In his Opening Brief on the Merits filed and served contemporaneously herewith, appellant argues that the trial court was obliged to adopt policies that carry out the legislative intent behind PC § 1538.5(p). The legislative-history documents which are the subject of the instant motion (Exhibit A) are relevant to the appeal because they clearly set forth that legislative intent. One aspect of appellant's argument is that a local rule of the Santa Clara County Superior Court provides that any adult criminal case may be heard in any courtroom within the court system. The document containing the court's local rules (Exhibit B) is relevant to the appeal because it provides authority for that proposition. (See Cal. Rules of Court, rule 8.252(a)(2)(A).)

II. Judicial notice

California courts may take judicial notice of appropriate matters. (Evid. Code,[1] §§ 450 et seq.) This authority extends to appellate courts as well as to trial courts. (§ 459, subd. (a)(2).)

A. Santa Clara County Superior Court rules

Section 452 lists matters of which the court may take judicial notice upon request provided that the requirements of section 453 are met. The list includes "Rules of court of . . . any court of this state." (§ 452, subd. (e).) Exhibit B hereto is a list of the criminal rules of court of the Santa Clara County Superior Court, a court of this state. It is, therefore, judicially noticeable pursuant to that subdivision. (See Cal. Rules of Court, rule 8.252(a)(2)(C).)

B. Legislative history

Section 453 also lists "Official acts of the legislative . . . department[] of . . . any state of the United States." (§ 452, subd. (c).) This subdivision has frequently been held to encompass materials which describe legislative history; that is, documents describing the activity surrounding the Legislature's adoption of statutes, even documents not prepared directly by the Legislature itself. (See, e.g., *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1172, fn. 5 [court "will generally grant requests to notice legislative history documents"]; *In re S.B.* (2004) 32 Cal.4th 1287, 1296, fn. 3 [bill analysis by Assembly Committee on Judiciary]; *Mooney v. County of Orange* (2013) 212 Cal.App.4th 865, 872.) Exhibit A hereto is a compi-

[1] All undesignated statutory references are to the Evidence Code.

lation of documents which are part of the legislative history of the adoption of PC §1538.5(p), prepared by the legislative-history service Legislative Research & Intent, LLC (hereafter "LRI"). It is judicially noticeable under section 452, subdivision (c). In *Post v. Prati* (1979) 90 Cal.App.3d 626, the reviewing court held that the trial court had properly taken judicial notice pursuant to section 452, subdivision (c) of "two major legislative committee reports on geothermal resources, the 'final [legislative] history' of the act, excerpts from testimony given at public legislative hearings, and some correspondence directed to the Governor's office recommending his signature on Senate Bill No. 169 (the act) from the legislative analyst, a state agency, and an individual legislator." Exhibit A hereto relates to the issues in this case in a closely analogous way, and are therefore subject to judicial notice under section 452, subdivision (c). (See Cal. Rules of Court, rule 8.252(a)(2)(C).)

In addition, several other statutes provide that courts should consider legislative history in the interpretation of statutes. (Code Civ. Proc, § 1859 [intention of Legislature to be pursued in construction of a statute]; Govt. Code, § 9080, subd. (a) [legislative records relating to bills provide evidence of legislative intent].) "In enforcing the command of a statute, both the policy expressed in its terms and the object implicit in its history and background should be recognized." (*Shafer v. Registered Pharmacists Union* (1940) 16 Cal.2d 379, 383.) "The guiding star of statutory construction is the intention of the Legislature. To the end that it be correctly ascertained the

statute is to be read in the light of its historical background and evident objective." (*H.S. Mann Corp. v. Moody* (1956) 144 Cal.App.2d 310, 320.) LRI's web site states that "The courts routinely treat our research reports the same way they treat case authority for construing legislative intent (see CCP § 1859)." (<http://www.lrihistory.com>.)

C. Appellant has complied with all applicable rules and prerequisites to judicial notice.

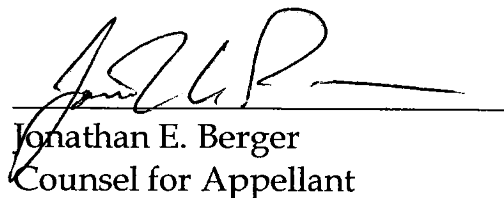
Judicial notice of an item specified in section 452 is mandatory so long as the party requesting such judicial notice gives each adverse party sufficient notice of the request, and provides the court with sufficient information to enable it to take the requested judicial notice. (§ 453 ["court *shall* take judicial notice"]; § 459, subd. (a) [reviewing court *shall* take judicial notice of each matter which trial court was required to notice under § 453].) Appellant has complied with both requirements by submitting the actual documents of which notice is sought to both the adverse party and this Court as exhibits to this motion. Consequently, the instant request falls within the mandatory language of section 453.

The documents sought to be noticed were not presented to the trial court. (See Cal. Rules of Court, rule 8.252(a)(2)(B).) The appeal under review by this Court was from a final judgment of conviction following a court trial, and the documents sought to be noticed relate to matters preceding that trial; specifically, to the court's assignment of appellant's re-filed suppression motion to a different

judge than the one who granted his first motion. (PC § 1538.5(p); see Cal. Rules of Court, rule 8.252(a)(2)(D).)

For the foregoing reasons, appellant respectfully requests this Court to grant this motion, and to take judicial notice of the two documents submitted herewith as Exhibits A and B.

Dated: June 10, 2015
Sebastopol, CA



Jonathan E. Berger
Counsel for Appellant

DECLARATION OF JONATHAN E. BERGER

I, Jonathan E. Berger, declare as follows:

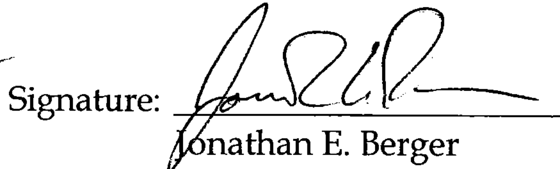
1. I am an attorney duly licensed to practice before all courts in the State of California. I represent the appellant in the above-captioned matter. I could competently testify to the matters herein in a court of law.

2. On March 29, 2015, I downloaded a document containing the legislative history of Senate Bill 933, from the 1993 legislative session, from Legislative Research & Intent, LLC, using the web site at the Internet address <www.lrihistory.com>. A true and correct copy of that document is attached hereto and labeled "Exhibit A."

3. On May 19, 2015, I downloaded a document containing the criminal local rules of the Santa Clara County Superior Court from the court's web site at Internet address <www.scscourt.org/general_info/rules/pdfs/Criminal.pdf>. A true and correct copy of that document is attached hereto and labeled "Exhibit B."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 10, 2015 Signature:
Sebastopol, CA



Jonathan E. Berger

EXHIBIT A

LEGISLATIVE HISTORY

CALIFORNIA

STATUTES OF 1993

CHAPTER 761

SB 933

LEGISLATIVE RESEARCH & INTENT LLC
1107 9TH STREET, SUITE 220, SACRAMENTO CA 95814
WWW.LRIHISTORY.COM . INTENT@LRIHISTORY.COM

Bill Versions

SOURCE:
OFFICIAL LEGISLATIVE ONLINE DATABASE

BILL NUMBER: SB 933   INTRODUCED 03/04/93
BILL TEXT

INTRODUCED BY Senator Kopp

MARCH 4, 1993

An act to amend Section 1538.5 of the Penal Code, relating to search warrants.

LEGISLATIVE COUNSEL'S DIGEST

SB 933, as introduced, Kopp. Search warrants: motions to suppress evidence..

Under existing law, if a defendant's motion to return property or suppress evidence is made at a special hearing in the superior court and is granted, and if the people have additional evidence relating to the motion and not presented at the special hearing, the people have the right to show good cause at the trial why the prior ruling at the special hearing should not be binding, or they may seek appellate review, as provided, unless the court, prior to the time the review is sought, has dismissed the case, as provided.

This bill would additionally provide that if the case has been dismissed either by the court or by the people on their own motion, the people may file a new complaint or seek an indictment, and the ruling at the special hearing shall not be binding in any subsequent proceeding.

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

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

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

1538.5. (a) 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 on either of the following grounds:

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

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of

the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

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

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

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

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

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

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

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

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence which could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

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

initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 15 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why {-such -} {+ the +} evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time {- such -} {+ the +} review is sought has dismissed the case pursuant to Section 1385. {+ If the case has been dismissed pursuant to Section 1385, or if the people dismiss the case on their own motion after the special hearings, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding. +} If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which {- such -} {+ the +} inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

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

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice

of intention to file such a petition, the defendant shall be
released pursuant to Section 1318 unless (1) he or she is
charged with a capital offense in a case where the proof is
evident and the presumption great, or (2) he or she is charged
with a noncapital offense defined in Chapter 1 (commencing with
Section 187) of Title 8 of Part 1 and the court orders that the
defendant be discharged from actual custody upon bail.

(l) If the defendant's motion to return property or suppress
evidence is granted, the trial of a criminal case shall be
stayed to a specified date pending the termination in the
appellate courts of this state of the proceedings provided for
in this section, Section 871.5, Section 1238, or Section 1466
and, except upon stipulation of the parties, pending the time
for the initiation of {- such -} {+ these +} proceedings. Upon
the termination of {- such -} {+ these +} proceedings, the
defendant shall be brought to trial as provided by Section 1382,
and subject to the provisions of Section 1382, whenever the
people have sought and been denied appellate review pursuant to
subdivision (o), the defendant shall be entitled to have the
action dismissed if he or she is not brought to trial within 30
days of the date of the order which is the last denial of the
petition. Nothing contained in this subdivision shall prohibit
a court, at the same time as it rules upon the search and
seizure motion, from dismissing a case pursuant to Section 1385
when {- such -} {+ the +} dismissal is upon the court's own
motion and is based upon an order at the special hearing
granting the defendant's motion to return property or suppress
evidence. In a misdemeanor case, the defendant shall be
entitled to a continuance of up to 30 days if he or she intends
to file a motion to return property or suppress evidence and
needs this time to prepare for the special hearing on the
motion. In case of an appeal by the defendant in a misdemeanor
case from the denial of {- such-} {+ the +} motion, he or she
shall be entitled to bail as a matter of right, and, in the
discretion of the trial or appellate court, may be released on
his or her own recognizance pursuant to Section 1318.

(m) The proceedings provided for in this section, Section
871.5, Section 995, Section 1238, and Section 1466 shall
constitute the sole and exclusive remedies prior to conviction
to test the unreasonableness of a search or seizure where the
person making the motion for the return of property or the
suppression of evidence is a defendant in a criminal case and
the property or thing has been offered or will be offered as
evidence against him or her. A defendant may seek further
review of the validity of a search or seizure on appeal from a
conviction in a criminal case notwithstanding the fact that {-
such -} {+ the +} judgment of conviction is predicated upon a
plea of guilty. {- Such review -} {+ Review +} on appeal may be
obtained by the defendant providing that at some stage of the
proceedings prior to conviction he or she has moved for the

return of property or the suppression of the evidence.

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 871.5 or 995 or the procedures which may be initiated after the granting or denial of such a motion.

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

BILL NUMBER: SB 933 AMENDED 05/20/93
BILL TEXT

AMENDED IN SENATE MAY 20, 1993

INTRODUCED BY Senator Kopp

MARCH 4, 1993

An act to amend Section 1538.5 of the Penal Code, relating to search warrants.

LEGISLATIVE COUNSEL'S DIGEST

SB 933, as amended, Kopp. Search warrants: motions to suppress evidence. {- .-}

Under existing law, if a defendant's motion to return property or suppress evidence is made at a special hearing in the superior court and is granted, and if the people have additional evidence relating to the motion and not presented at the special hearing, the people have the right to show good cause at the trial why the prior ruling at the special hearing should not be binding, or they may seek appellate review, as provided, unless the court, prior to the time the review is sought, has dismissed the case, as provided.

This bill would additionally provide that if the case has been dismissed either by the court or by the people on their own motion, the people may file a new complaint or seek an indictment, and the ruling at the special hearing shall not be binding in any subsequent proceeding. {+ However, it also would provide that if a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing in the superior court, unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the 2nd suppression hearing. +}

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

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. {+ It is the intent of the Legislature, in amending Section 1538.5 of the Penal Code, that this act shall not be construed or used by a party as a means to forum shop.

SEC. 2. +} Section 1538.5 of the Penal Code is amended to read:

1538.5. (a) 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 on either of the following grounds:

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

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

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

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

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

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section {- or -} {+ , +} Section 1238 or {- Section -} 1466, the property is not subject to lawful detention or if the time for initiating {- such -} {+ the +} proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5 {- , -} or {- Section -} 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of {- such -} {+ the +} proceedings, the property is no longer subject to lawful detention.

(f) If the property or evidence relates to a felony offense

initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that the defendant may make the motion at the preliminary hearing in the municipal or justice court {+ , +} but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

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

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

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people {+ , +} unless the people are willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence {- which -} {+ that +} could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by

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

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding {+ , except as limited by subdivision (p) +} . In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people {+ , +} within 15 days after the preliminary hearing {+ , +} request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. {+ The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice. +} If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court {+ , +} prior to the time the review is sought {+ , +} has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, or if the people dismiss the case on their own motion after the special {- hearings -} {+ hearing +} , the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding {+ , except as limited by subdivision (p) +} . If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the

right to appeal any decision of that court relating to that motion to the superior court of the county in which the inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

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

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

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, {- Section -} 1238, or {- Section -} 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and {+ , +} subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order {- which -} {+ that +} is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case

of an appeal by the defendant in a misdemeanor case from the denial of the motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318.

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

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant {- which -} {+ that +} may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 871.5 or 995 {+ , +} or the procedures {- which -} {+ that +} may be initiated after the granting or denial of such a motion.

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

(p) If a defendant's motion to return property or suppress

evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing in the superior court as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. +}

BILL NUMBER: SB 933   AMENDED 08/16/93
BILL TEXT

AMENDED IN ASSEMBLY AUGUST 16, 1993
AMENDED IN SENATE MAY 20, 1993

INTRODUCED BY Senator Kopp

MARCH 4, 1993

An act to amend Section 1538.5 of the Penal Code, relating to search warrants.

LEGISLATIVE COUNSEL'S DIGEST

SB 933, as amended, Kopp. Search warrants: motions to suppress evidence.

Under existing law, if a defendant's motion to return property or suppress evidence is made at a special hearing in the superior court and is granted, and if the people have additional evidence relating to the motion and not presented at the special hearing, the people have the right to show good cause at the trial why the prior ruling at the special hearing should not be binding, or they may seek appellate review, as provided, unless the court, prior to the time the review is sought, has dismissed the case, as provided.

This bill would additionally provide that if the case has been dismissed either by the court or by the people on their own motion, the people may file a new complaint or seek an indictment, and the ruling at the special hearing shall not be binding in any subsequent proceeding. However, it also would provide that if a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing in the superior court, unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the 2nd suppression hearing.

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

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. It is the intent of the Legislature, in amending Section 1538.5 of the Penal Code, that this act shall not be

construed or used by a party as a means to forum shop.

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

1538.5. (a) 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 on either of the following grounds:

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

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

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

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

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

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

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that

the defendant may make the motion at the preliminary hearing in the municipal or justice court, but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

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

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

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people, unless the people are willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people, within 15 days after the preliminary hearing, request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, or if the people dismiss the case on their own motion after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which the inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal

cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

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

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

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, 1238, or 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and, subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order that is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of the motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318.

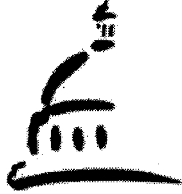
(m) The proceedings provided for in this section, and

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

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant that may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 871.5 or 995, or the procedures that may be initiated after the granting or denial of such a motion.

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

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



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California Session Laws

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Volume 3

STATUTES OF CALIFORNIA

AND DIGESTS OF MEASURES

1993

Constitution of 1879 as Amended

Measures Submitted to Vote of Electors,
Special Statewide Election, November 2, 1993

General Laws, Amendments to the Codes, Resolutions,
and Constitutional Amendments passed by the
California Legislature

1993–94 Regular Session

Compiled by
BION M. GREGORY
Legislative Counsel

only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

CHAPTER 761

An act to amend Section 1538.5 of the Penal Code, relating to search warrants.

[Approved by Governor October 2, 1993. Filed with Secretary of State October 4, 1993.]

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

SECTION 1. It is the intent of the Legislature, in amending Section 1538.5 of the Penal Code, that this act shall not be construed or used by a party as a means to forum shop.

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

1538.5. (a) 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 on either of the following grounds:

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

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

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

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

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

(e) If a search or seizure motion is granted at a trial, the property

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

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

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

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

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people, unless the people are willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses

who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people, within 15 days after the preliminary hearing, request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, or if the people dismiss the case on their own motion after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the

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ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which the inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

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

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

(*l*) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, 1238, or 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and, subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order that is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file

a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of the motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318.

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

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant that may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 871.5 or 995, or the procedures that may be initiated after the granting or denial of such a motion.

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

(p) If a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing in the superior court as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was

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not reasonably discoverable at the time of the second suppression hearing. Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available.

CHAPTER 762

An act to amend Sections 25110, 25540, and 25541 of the Corporations Code, relating to corporations.

[Approved by Governor October 2, 1993. Filed with Secretary of State October 4, 1993.]

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

SECTION 1. Section 25110 of the Corporations Code is amended to read:

25110. It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), whether or not by or through underwriters, unless such sale has been qualified under Section 25111, 25112 or 25113 (and no order under Section 25140 or subdivision (a) of Section 25143 is in effect with respect to such qualification) or unless such security or transaction is exempted under Chapter 1 (commencing with Section 25100) of this part. The offer or sale of such a security in a manner that varies or differs from, exceeds the scope of, or fails to conform with either a material term or material condition of qualification of the offering as set forth in the permit or qualification order, or a material representation as to the manner of offering which is set forth in the application for qualification, shall be an unqualified offer or sale.

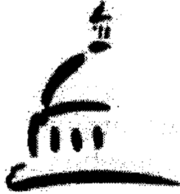
SEC. 2. Section 25540 of the Corporations Code is amended to read:

25540. (a) Except as provided for in subdivision (b), any person who willfully violates any provision of this law, or who willfully violates any rule or order under this law, shall upon conviction be fined not more than one million dollars ($1,000,000), or imprisoned in the state prison, or in a county jail for not more than one year, or be punished by both such fine and imprisonment; but no person may be imprisoned for the violation of any rule or order if he or she proves that he or she had no knowledge of the rule or order.

(b) Any person who willfully violates Section 25400, 25401, or 25402 shall upon conviction be fined not more than ten million dollars ($10,000,000), or imprisoned in the state prison for two, three, or five years, or be punished by both such fine and imprisonment.

SEC. 2.5. Section 25540 of the Corporations Code is amended to read:

25540. (a) Except as provided for in subdivision (b), any person who willfully violates any provision of this law, or who willfully



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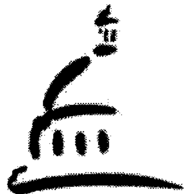
Final History

SOURCE:
OFFICIAL LEGISLATIVE ONLINE DATABASE

COMPLETE BILL HISTORY

BILL NUMBER : S.B. No. 933
AUTHOR : Kopp
TOPIC : Search warrants: motions to suppress evidence.

BILL HISTORY
1993
Oct. 4 Chaptered by Secretary of State. Chapter 761, Statutes of 1993.
Oct. 2 Approved by Governor.
Sept. 9 Enrolled. To Governor at 10 a.m.
Sept. 1 Senate concurs in Assembly amendments. (Ayes 27. Noes 1. Page 2991.) To enrollment.
Aug. 26 In Senate. To unfinished business.
Aug. 26 Read third time. Passed. (Ayes 74. Noes 0. Page 3591.) To Senate.
Aug. 17 Read second time. To third reading.
Aug. 16 Withdrawn from committee. Ordered placed on second reading.
Aug. 16 From committee: Do pass as amended, but first amend, and re-refer to Com. on W. & M. (Ayes 7. Noes 0.) Read second time. Amended. Re-referred to Com. on W. & M.
June 7 To Com. on PUB. S.
May 28 In Assembly. Read first time. Held at Desk.
May 28 Read third time. Passed. (Ayes 33. Noes 1. Page 1400.) To Assembly.
May 20 Read second time. Amended. To third reading.
May 19 From committee: Do pass as amended. (Ayes 10. Noes 1. Page 1092.)
Mar. 29 Set for hearing May 11.
Mar. 18 To Com. on JUD.
Mar. 7 From print. May be acted upon on or after April 6.
Mar. 4 Introduced. Read first time. To Com. on RLS. for assignment. To print.



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Online Materials

SOURCE:
OFFICIAL LEGISLATIVE ONLINE DATABASE

BILL ANALYSIS
SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1993-94 Regular Session

SB 933 (Kopp)
As introduced
Hearing date: May 11, 1993
Penal Code
LGK

MOTIONS TO SUPPRESS EVIDENCE

HISTORY

Source: Los Angeles District Attorney

Prior Legislation: AB 2328 (1986) - Chaptered

Support: No known

Opposition: California Attorneys for Criminal Justice

KEY ISSUES

SHOULD THE PROSECUTION BE ENTITLED TO FILE A NEW COMPLAINT OR SEEK
šAN INDICTMENT AFTER THE DEFENDANT'S MOTION TO RETURN PROPERTY OR
šSUPPRESS EVIDENCE IS GRANTED AT A SPECIAL HEARING OF THE SUPERIOR
šCOURT?

IN SUCH A CASE, SHOULD THE RULING AT THE SPECIAL HEARING NOT BE
šBINDING IN A SUBSEQUENT PROCEEDING?

PURPOSE

Existing law permits a motion to suppress evidence at a special
šhearing in superior court. If the motion is granted, and if the
šprosecution has additional evidence relating to the motion and not
špresented at the special hearing, the prosecution may show good

šcause at the trial why the ruling at the special hearing should not šbe binding. Alternatively, the prosecution may seek appellate šreview as long as the case has not already been dismissed.

(More)

This bill would additionally authorize the prosecution to file a šnew complaint if the case is dismissed by the judge or if the šprosecution dismissed the case on its own motion after the special šhearing. In that situation, the ruling at the special hearing šwould not be binding in the new action.

The purpose of this bill is to allow the prosecution another chance šafter losing a motion to suppress evidence at a special hearing in šsuperior court when good cause or the basis for appellate review šdoes not exist.

COMMENT

1. Expressed purpose of the bill

   According to the sponsor, the purpose of this bill is to provide the prosecution with the additional remedy of refiling a case after the case is dismissed because the defendant was granted a suppression motion at a special hearing of the superior court. According to the sponsor, a recent Supreme Court case, Schlick v. Superior Court (December 17, 1992) 4 Cal.4th 310, interpreting Penal Code Section 1538.5,

   > held that the prosecution cannot simply dismiss the case and refile it and start all over again but must instead pursue the relitigation or appellate procedures set forth in 1538.5 - even if the case had not previously been dismissed and refiled. The Court cited as the basis of this holding the language of PC 1538.5 itself.

The problem with this decision is that we can now suffer the permanent dismissal of a felony case simply because we did a poor job in presenting our evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j) does permit us to seek to renew a 1538.5 motion first made at the special hearing in the superior court and present new evidence if we can show good cause as to why that evidence wasn't presented at the first hearing. But very often the reason we didn't do a good job at the first hearing was simply that due to the press of cases our deputy was not sufficiently prepared, or did not subpoena an essential witness, or an essential witness did not appear. These reasons would not be considered good cause to renew the hearing but do occur with some frequency. ... The right to refile and relitigate the 1538.5 motion - even if it means admitting we did a bad job the first time - is

(More)

better than the irredeemable dismissal of an important case.

2. Compare to dismissal at preliminary hearing

When the defendant's motion to suppress evidence is granted at a preliminary hearing on a felony offense, and when the defendant is not held to answer in superior court, "the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding", Penal Code Section 538.5, subdivision (j).

The language of this bill parallels that language.

When the defendant's motion to suppress evidence is granted at a preliminary hearing on a felony offense, and when the defendant is held to answer in superior court, "the ruling at the preliminary hearing shall be binding upon the people" unless the prosecution requests a special hearing in superior court.

3. People's ability to relitigate the suppression motion

This bill and existing law would permit the following scenario:

A defendant's motion for suppression of evidence is granted at the preliminary hearing (first time), and the defendant is held to answer in superior court.

The prosecution then notifies the defendant and the court within 15 days and requests a special hearing in superior court. At the special hearing, the validity of the search is relitigated de novo, and the superior court grants the defendant's motion (second time).

The prosecution then dismisses the case on its own motion after the special hearing and files a new complaint. At the preliminary hearing, the two prior rulings for the defendant are not binding and the defendant must move to suppress the evidence for the third time.

If the defendant's third suppression motion is granted, the people may move for a special hearing, for the forth hearing on suppression.

This ability to relitigate suppression motions is undoubtedly not intended by the sponsor.

SHOULD THE MAXIMUM NUMBER OF SUPPRESSION HEARINGS BE LIMITED TO TWO?

(More)

The Schlick Court, citing an earlier case, noted that the legislative intent underlying Section 1538.5:

> was to reduce the unnecessary waste of judicial time and effort involved in the prior procedures, whereby search and seizure questions could be repeatedly raised in criminal proceedings.

Citations.! Our š interpretation of section 1538.5, subdivision (d), is consistent with the foregoing description of legislative intent, precluding the People from

relitigating suppression issues presumably already fully and completely litigated in superior court.

4. Opposition

California Attorneys for Criminal Justice is opposed to this bill because it would allow prosecutors to "take another shot" with another judge after losing a suppression motion in superior court. CACJ believes that the bill would encourage forum shopping and delay proceedings without any real benefit.

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(More)

BILL ANALYSIS

THIRD READING

SB 933

Kopp (I)

5/20/93

21

SUBJECT: Motions to suppress evidence

SOURCE: Los Angeles District Attorney

DIGEST: This bill provides that the prosecution be entitled to file a
šnew complaint or seek an indictment after the defendant's motion to return
šproperty or suppress evidence is granted at a special hearing of the
šsuperior court.

ANALYSIS: Existing law permits a motion to suppress evidence at a
šspecial hearing in superior court. If the motion is granted, and if the
šprosecution has additional evidence relating to the motion and not
špresented at the special hearing, the prosecution may show good cause at
šthe trial why the ruling at the special hearing should not be binding.
šAlternatively, the prosecution may seek appellate review as long as the
šcase has not already been dismissed.

First of all, this bill specifies that the intent of the Legislature,

šthrough this legislation, shall not be construed as a means to forum shop.

This bill would additionally authorize the prosecution to file a new
šcomplaint if the case is dismissed by the judge or if the prosecution
šdismissed the case on its own motion after the special hearing. In that
šsituation, the ruling at the special hearing would not be binding in the
šnew action.

The bill specifies that, if a defendant's motion to return property or
šsuppress evidence in a felony matter has been granted twice, the people may
šnot file a new complaint or seek an indictment in order to relitigate the
šmotion or relitigate the matter de novo at a special hearing in the
šsuperior court, unless the people discover

additional evidence relating to the motion that was not reasonably
šdiscoverable at the time of the second suppression hearing.

The purpose of this bill is to allow the prosecution another chance after
šlosing a motion to suppress evidence at a special hearing in superior court
šwhen good cause or the basis for appellate review does not exist.

According to the sponsor, a recent Supreme Court case, Schlick v. Superior
šCourt (December 17, 1992) 4 Cal.4th 310, interpreting Penal Code Section
š1538.5, "held that the prosecution cannot simply dismiss the case and
šrefile it and start all over again but must instead pursue the relitigation
šor appellate procedures set forth in 1538.5 - even if the case had not
špreviously been dismissed and refiled. The Court cited as the basis of
šthis holding the language of PC 1538.5 itself.

"The problem with this decision is that we can now suffer the permanent
šdismissal of a felony case simply because we did a poor job in presenting
šour evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j)
šdoes permit us to seek to renew a 1538.5 motion first made at the special
šhearing in the superior court and present new evidence if we can show good
šcause as to why that evidence wasn't presented at the first hearing. But
švery often the reason we didn't do a good job at the first hearing was
šsimply that due to the press of cases our deputy was not sufficiently
šprepared, or did not subpoena an essential witness, or an essential witness
šdid not appear. These reasons would not be considered good cause to renew
šthe hearing but do occur with some frequency. ... The right to refile and
šrelitigate the 1538.5 motion - even if it means admitting we did a bad job
šthe first time - is better than the irredeemable dismissal of an important
šcase".

When the defendant's motion to suppress evidence is granted at a
špreliminary hearing on a felony offense, and when the defendant is not
šheld to answer in superior court, "the people may file a new complaint or
šseek an indictment after the preliminary hearing, and the ruling at the
šprior hearing shall not be binding in any subsequent proceeding", Penal
šCode Section 538.5, subdivision (j).

The language of this bill parallels that language.

When the defendant's motion to suppress evidence is granted at a špreliminary hearing on a felony offense, and when the defendant is held što answer in superior court, "the ruling at the preliminary hearing shall šbe binding upon the people" unless the prosecution requests a special šhearing in superior court.

FISCAL EFFECT: Appropriation: No Fiscal Committee: No Local: No

SUPPORT: (Verified 5/20/93)

Los Angeles District Attorney (source)
Legislative Oversight Committee

CONTINUED

ARGUMENTS IN SUPPORT: According to the sponsor, the purpose of this šbill is to provide the prosecution with the additional remedy of refiling a šcase after the case is dismissed because the defendant was granted a šsuppression motion at a special hearing of the superior court.

RJG:lm 5/20/93 Senate Floor Analyses

CONTINUED

BILL ANALYSIS

SB 933

Date of Hearing: July 13, 1993
Counsel: Judith M. Garvey

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bob Epple, Chair

SB 933 (Kopp) - As Amended: May 20, 1993

ISSUE: SHOULD THE PROSECUTION BE GIVEN A SECOND OPPORTUNITY TO
šFULLY LITIGATE A PENAL CODE SECTION 1538.5 MOTION TO
šSUPPRESS EVIDENCE AFTER SUCH MOTION IS ONCE GRANTED IN THE SUPERIOR
šCOURT AND THE CASE DISMISSED AS A RESULT THEREOF?
š

DIGEST

Under current law:

1) In criminal cases, Penal Code section 1538.5 specifies the manner in which a defendant can move to suppress evidence obtained by an allegedly illegal search and seizure by peace officers or other state agents. In felony cases, the defendant may make the motion to suppress (hereinafter MTS) in the municipal court at the preliminary hearing or at what is called a special hearing in the superior court. If the MTS is granted, the suppressed evidence shall not be admissible against the defendant at the trial unless the prosecution successfully pursues one of the remedies set forth in Penal Code section 1538.5. (Penal Code section 1538.5.)

2) The prosecution's remedies are as follows: If the MTS is made and
š granted at the preliminary hearing and the case is dismissed by the magistrate or by the prosecution on its own motion, the prosecution may then refile the case and start all over again. The ruling at the first MTS is not binding on the refilled case. If the MTS is granted at the preliminary hearing but the defendant is nevertheless held to answer for trial, the prosecution may relitigate the suppression motion de novo at what is called a special hearing in the superior court. Again, the ruling at the first MTS is not binding at the subsequent hearing. (Penal Code section 1538.5)

3) If the MTS is not made by the defendant at the preliminary hearing,
š but is made for the first time in the superior court, and is

granted, the remedies available to the prosecution are as follows:
a) if the prosecution has additional evidence not presented at the MTS and can show good cause why such evidence was not presented, the prosecution may then present that evidence and seek to have the prior ruling overturned; b) the prosecution may seek appellate review. (Penal Code section 1538.5.)

- continued -

SB 933

4) The prosecution cannot simply refile and relitigate the MTS of a case
š dismissed as a result of an adverse ruling on a MTS in the superior court. Schlick v. uperior Court (1992) 4 C.4th 310, 316. The ruling on the MTS

in the superior court would be binding on the refiled case.

This bill:

1) Authorizes the prosecution to file a new complaint (or seek a new indictment) and start a felony prosecution anew if the case is dismissed either by the judge or the prosecution on its own motion following the granting of a MTS made in the superior court. The ruling on the prior MTS would not be binding in the new action.

2) Specifies that if a defendant's MTS in a felony matter has been
š granted twice, the prosecution cannot file a new complaint or seek a new indictment in order to relitigate the suppression issue unless the prosecution discovers additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing.

3) Declares legislative intent that the provisions of this bill shall
š not be construed as an encouragement to forum shop.

COMMENTS

1) Purpose. According to the author:

> The recent California Supreme Court case of Schlick v. Superior Court (1992) 4 Cal.4th 310, 315, held that the express terms of Penal Code section 1538.5 prohibit the prosecution from relitigating a MTS made and granted in the superior Court. Thus, the prosecution cannot simply refile a case and relitigate the suppression motion (as it can under the language of Penal

Code section 1538.5 if the MTS is made and granted at the preliminary hearing). Prior to the Schlick case, the prosecution could simply refile a case and relitigate the suppression motion if the prosecution was not satisfied with the way the suppression motion was litigated or the ruling on the motion in the superior court. Such refiling and relitigation was done - not often, but occasionally - and had been approved in the case of People v. Methey (1991) 227 C.A.3d 349, which the Schlick case overruled.

2) SB 933. SB 933 will restore the law to that status quo ante prior š to Schlick but with the limitation that the prosecution cannot refile a case and relitigate the suppression motion if such MTS has been granted twice unless new evidence is discovered which was not reasonably discoverable to the prosecution at the time of the second suppression hearing. Prior to Schlick, it was technically possible for the prosecution to litigate a suppression motion four times (see Comment 3 of the Senate Committee on Judiciary Analysis of SB 933 as SB 933 appeared prior to the most recent amendment

- continued -

adding subdivision (p) and limiting such litigation of suppression motions to two times).

3) Need for Bill. The reasons the prosecution seeks the right to š refile a case and relitigate a suppression motion after such motion is granted in the superior court are as follows:

a) History. Basically, this bill simply restores the law to the status quo ante before Schlick but with the limitation of two suppression hearings only. Moreover, in the Schlick decision, the Supreme Court

did not say there was necessarily anything unfair, unreasonable or šunconstitutional about refiling a case and relitigating a MTS granted šin the superior court but merely that the language of Penal Code šsection 1538.5, strictly construed, did not permit it.

b) Volume. Why does the prosecution want two shots at the apple? Isn't one fully litigated hearing enough, particularly since Penal Code section 1538.5 does allow the prosecution to renew the motion and present additional evidence if such evidence were not reasonably discoverable to the prosecution at the time of the suppression motion in the superior court and/or to seek

appellate review?

The Los Angeles District Attorney (LADA) says no. The LADA states that "superior court calendars are crowded. Deputy district attorneys must juggle many cases each day. Many 1538.5 motions are calendared but are not heard - the case may be continued or perhaps some settlement arrived at. The prosecutor rarely knows exactly which 1538.5 motion is actually going to be litigated on a particular day. Thus, the prosecutor may not be fully knowledgeable of the facts or what witnesses are necessary on every case. And usually the defendant's moving papers are very vague and merely assert that the search was without probable cause without specifying exactly what was wrong with the search."

The LADA states that "if a 1538.5 hearing does take place, the prosecutor may discover in the middle of the hearing that the grounds for the motion were not what the prosecutor anticipated and that a necessary witness is not available or that important evidence was not presented. Sometimes the prosecutor will be "ambushed" by a defense attorney who presents several unanticipated witnesses or an unanticipated legal theory. Often, a skilled prosecutor can overcome these problems and effectively present the prosecution's evidence showing that a search was legal. But sometimes, the prosecutor cannot. And the only way to show that the search was legal is to start all over and relitigate the suppression motion. This can be done if the motion is granted in the municipal court. But, since Schlick, it cannot be done if the motion is granted in the superior court."

- continued -

SB 933

c) Fairness. Often, the MTS is dispositive of a case. If it is granted, the case must be dismissed. If it is denied, the defendant will plead guilty or in all likelihood be found guilty if brought to trial. The LADA believes that "it is unfair to the prosecution and to the law abiding citizens of this state for a criminal defendant whose culpability for a serious felony may be beyond question to "beat the rap" simply because an overworked prosecutor at one pretrial hearing was unable to present the People's evidence in the most effective manner. The ability to refile and relitigate the suppression motion - one more time - will largely overcome this without comprising any

constitutional right of the defendant or subjecting him to repeated and harassing prosecution. Refiling and relitigation of suppression motions, as done prior to the Schlick case, was never considered unreasonably burdensome upon a defendant."

d) Refiling. Penal Code section 1538.5 explicitly allows such case refiling and relitigation of suppression motions following the granting

of a MTS in the municipal court. Should there be any difference when the MTS is made in the superior court, particularly when SB 933 limits such litigation to two hearings?

e) Shift to Superior Court. The LADA believes that if this bill is not enacted, defense attorneys in felony matters will no longer make their MTS's in municipal court - where the prosecution can refile and relitigate the matter or seek relitigation in the superior court - where the prosecution's remedies are limited to appellate review. This will place the entire burden of suppression motions upon the superior court whereas prior to Schlick, most MTS were litigated in the municipal court.

f) Expedite Process. If this bill is not enacted and the LADA is correct, defense attorneys will make suppression motions in the superior court in virtually every case in the hopes that the prosecution will do a poor job and the court will grant the MTS. The prosecution will then be limited to its appellate remedies, but if the prosecution did not present sufficient evidence to justify the search at the MTS, there would be no basis for an appeal and the case would be irretrievably dismissed. However, if the bill is enacted, the defense attorneys would be unlikely to bring weak suppression motions since they would know that even if they won as a result of poor lawyering on the part of the prosecution or because the defense successfully surprised the prosecution, the prosecution would simply refile the case and would be better prepared the second time. This bill will expedite the processing of criminal cases by discouraging defense attorneys from presenting meritless suppression motions.

g) Financial Incentives to Refile vs. Appeal. Even if the prosecution is certain it would prevail if an adverse ruling on a MTS in the superior court were appealed, it is often cheaper and faster to simply refile and relitigate the matter,

- continued -

particularly if the prosecution can present the case more effectively the second time than to pursue appellate remedies. Also, during the period of appeal, most defendants, if in custody, must be released. Often they cannot be located even if the prosecution wins on appeal.

h) Discourage Forum Shopping. The LADA states that "courts are aware of the problems caused by forum shopping and have devised procedures to prevent it. Moreover, cases are usually assigned by court clerks or by random assignment so that there is no way a prosecutor could direct a case into a particular court."

i) Benefit. The LADA believes that nothing in this bill will enable police to get away with illegal searches. All it does is give the prosecution a second chance to show a search was legal.

4) Related Legislation. One of the many provisions in AB 1215 (Rainey) would have allowed refiling, as specified, and the use of previously suppressed evidence. This bill failed passage on April 13, 1993.

5) Opposition.

a) The California Attorneys for Criminal Justice (CACJ). CACJ oppose šthis

bill because it "would encourage forum shopping" and "delay proceedings without any real benefit."

This bill contains legislative intent that in amending section 1538.5 of the Penal Code this act shall not be construed or used by a party as a means to forum shop.

b) The Judicial Council. The Judicial Council opposes this bill because by reversing the Schlick rule, this bill would provide the prosecution with unnecessary additional refiling remedies and thereby expend more scarce judicial time and efforts in such proceedings.

SOURCE: Los Angeles District Attorney

SUPPORT: California Peace Officers' Association
California Police Chiefs' Association

OPPOSITION: California Attorneys for Criminal Justice
The Judicial Council of California

- continued -

BILL ANALYSIS
UNFINISHED BUSINESS

SB 933

Kopp (I)

8/16/93

21

p. 1400, 5/28/93

74-0, 8/26/93

SUBJECT: Motions to suppress evidence

SOURCE: Los Angeles District Attorney

DIGEST: This bill provides that the prosecution be entitled to file a
šnew complaint or seek an indictment after the defendant's motion to return
šproperty or suppress evidence is granted at a special hearing of the
šsuperior court.

Assembly Amendments provide that relitigation of a specified motion must
šbe heard by the same judge, if possible.

ANALYSIS: Existing law permits a motion to suppress evidence at a
šspecial hearing in superior court. If the motion is granted, and if the
šprosecution has additional evidence relating to the motion and not
špresented at the special hearing, the prosecution may show good cause at
šthe trial why the ruling at the special hearing should not be binding.
šAlternatively, the prosecution may seek appellate review as long as the

šcase has not already been dismissed.

First of all, this bill specifies that the intent of the Legislature, šthrough this legislation, shall not be construed as a means to forum shop.

This bill would additionally authorize the prosecution to file a new šcomplaint if the case is dismissed by the judge or if the prosecution šdismissed the case on its own motion after the special hearing. In that šsituation, the ruling at the special hearing would not be binding in the šnew action.

The bill specifies that, if a defendant's motion to return property or šsuppress evidence in a felony matter has been granted twice, the people may šnot file a new complaint or seek an indictment in order to relitigate the šmotion or relitigate the matter de novo at a special hearing in the šsuperior court, unless the people discover additional evidence relating to šthe motion that was not reasonably discoverable at the time of the second šsuppression hearing. Relitigation of the motion shall be heard by the same šjudge who granted the motion at the first hearing if that judge is šavailable.

The purpose of this bill is to allow the prosecution another chance after šlosing a motion to suppress evidence at a special hearing in superior court šwhen good cause or the basis for appellate review does not exist.

According to the sponsor, a recent Supreme Court case, Schlick v. Superior šCourt (December 17, 1992) 4 Cal.4th 310, interpreting Penal Code Section š1538.5, "held that the prosecution cannot simply dismiss the case and šrefile it and start all over again but must instead pursue the relitigation šor appellate procedures set forth in 1538.5 - even if the case had not špreviously been dismissed and refiled. The Court cited as the basis of šthis holding the language of PC 1538.5 itself.

"The problem with this decision is that we can now suffer the permanent šdismissal of a felony case simply because we did a poor job in presenting šour evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j) šdoes permit us to seek to renew a 1538.5 motion first made at the special šhearing in the superior court and present new evidence if we can show good šcause as to why that evidence wasn't presented at the first hearing. But švery often the reason we didn't do a good job at the first hearing was šsimply that due to the press of cases our deputy was not sufficiently šprepared, or did not subpoena an essential witness, or an essential witness šdid not appear. These reasons would not be considered good cause to renew šthe hearing but do occur with some frequency. ... The right to refile and šrelitigate the 1538.5 motion - even if it means admitting we did a bad job šthe first time - is better than the irredeemable dismissal of an important šcase".

When the defendant's motion to suppress evidence is granted at a
špreliminary hearing on a felony offense, and when the defendant is not
šheld to answer in superior court, "the people may file a new complaint or
šseek an indictment after the preliminary hearing, and the ruling at the
šprior hearing shall not be binding in any subsequent proceeding", Penal
šCode Section 538.5, subdivision (j).

The language of this bill parallels that language.

When the defendant's motion to suppress evidence is granted at a
špreliminary hearing on a felony offense, and when the defendant is held
što answer in superior court, "the ruling at the preliminary hearing shall
šbe binding upon the people" unless the prosecution requests a special
šhearing in superior court.

CONTINUED

FISCAL EFFECT: Appropriation: No Fiscal Committee: No Local: No

SUPPORT: (Verified 8/26/93)

Los Angeles District Attorney (source)
Legislative Oversight Committee

ARGUMENTS IN SUPPORT: According to the sponsor, the purpose of this
šbill is to provide the prosecution with the additional remedy of refiling a
šcase after the case is dismissed because the defendant was granted a
šsuppression motion at a special hearing of the superior court.

RJG:lm 8/26/93 Senate Floor Analyses

CONTINUED

BILL ANALYSIS

SB 933

SENATE THIRD READING

SB 933 (Kopp) - As Amended: August 16, 1993

SENATE VOTE: 33-1

ASSEMBLY ACTIONS:

COMMITTEE PUB. S. VOTE 7-0 COMMITTEE VOTE

DIGEST

Under current law:

1) If a motion to suppress (MTS) is made and granted at the preliminary
š hearing and the case is dismissed by the magistrate or by the prosecution on its own motion, the prosecution may then refile the case and start all over again. The ruling at the first MTS is not binding on the refilled case. If the MTS is granted at the preliminary hearing but the defendant is nevertheless held to answer for trial, the prosecution may relitigate the suppression motion de novo at what is called a special hearing in the superior court. Again, the ruling at the first MTS is not binding at the subsequent hearing.

2) If the MTS is not made by the defendant at the preliminary hearing, but
š is made for the first time in the superior court, and is granted, the remedies available to the prosecution are as follows: a) if the prosecution has additional evidence not presented at the MTS and can show good cause why such evidence was not presented, the prosecution may then present that evidence and seek to have the prior ruling overturned; b) the prosecution may seek appellate review.

3) The prosecution cannot simply refile and relitigate the MTS of a case
š dismissed as a result of an adverse ruling on a MTS in the superior court. Schlick v. Superior Court (1992) 4 C.4th 310, 316. The ruling on the MTS in the superior court would be binding on the refiled case.

This bill:

1) Authorizes the prosecution to file a new complaint (or seek a new indictment) and start a felony prosecution anew if the case is dismissed either by the judge or the prosecution on its own motion following the granting of a MTS made in the superior court. The ruling on the prior MTS would not be binding in the new action.

2) Provides that relitigation of the motion should be heard by the same judge who granted the motion at the first hearing, if available.

3) Specifies that if a defendant's MTS in a felony matter has been granted š twice, the prosecution cannot file a new complaint or seek a new indictment in order to relitigate the suppression issue unless the prosecution discovers additional evidence relating to the motion that

- continued -

was not reasonably discoverable at the time of the second suppression hearing.

4) Declares legislative intent that the provisions of this bill shall š not be construed as an encouragement to forum shop.

COMMENTS

According to the author, this bill was written to correct an anomaly in the šlaw caused by the California Supreme Court decision in Schlick v. Superior šCourt. Prior to that case, if the defense challenged the lawfulness of a šsearch in a felony matter, the prosecution had four opportunities to show šthe search was legal, two at the preliminary hearing in the municipal court šand two at a special pretrial hearing in the superior court. As a result šof the Schlick case which relied upon the language of Penal Code Section š1538.5 the prosecution now has either as many as three opportunities to šshow that a challenged search was legal, if the challenge is first brought šat the preliminary hearing, or as few as one opportunity if the challenge šis first brought in the superior court.

This bill will simplify Penal Code Section 1538.5 so that the prosecution šwill have two opportunities to show that a challenged search was legal šregardless of whether the challenge to the search is first brought in the šmunicipal court or the superior court. It presents a balanced approach to šthe litigation of search to the litigation of search and seizure motions.

- continued -

SB 933
Page 2

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Governor's Chaptered Bill File

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Deputies

Sacramento, California
September 14, 1993

Honorable Pete Wilson
Governor of California
Sacramento, CA 95814

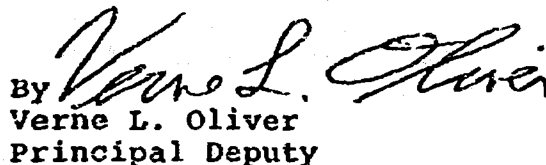
Senate Bill No. 933

Dear Governor Wilson:

Pursuant to your request, we have reviewed the above-numbered bill authored by Senator Kopp and, in our opinion, the title and form are sufficient and the bill, if chaptered, will be constitutional. The digest on the printed bill as adopted correctly reflects the views of this office.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By 
Verne L. Oliver
Principal Deputy

VLO:nd

Two copies to Honorable Quentin Kopp, pursuant to Joint Rule 34.

SACRAMENTO ADDRESS
STATE CAPITOL
95814
916 445-0503

California State Senate

STATE SENATOR
QUENTIN L. KOPP
EIGHTH SENATORIAL DISTRICT
REPRESENTING SAN FRANCISCO AND SAN MATEO COUNTIES

September 7, 1993

Hon. Pete Wilson
Governor, State of California
State Capitol
Sacramento, CA 95814

Senate Bill 933

Attention: Ms. Karen Morgan

Dear Governor Wilson:

Senate Bill 933, which has been approved by the State Legislature, corrects an anomaly in the law caused by the December, 1992 California Supreme Court decision in Schlick v. Superior Court (4 Cal.4th 310).

As a result of the Schlick case, the prosecution now has either as many as three opportunities to show under Section 1538.5 of the Penal Code that a challenged search was legal, if the challenge is first brought at the preliminary hearing, or as few as one opportunity if the challenge is first brought in the superior court.

SB 933 will simplify the procedure so that the prosecution will have two opportunities to show that a challenged search was legal regardless of whether the challenge to the search is first brought in the municipal court or the superior court. It presents a balanced approach to the litigation of search and seizure motions under Section 1538.5.

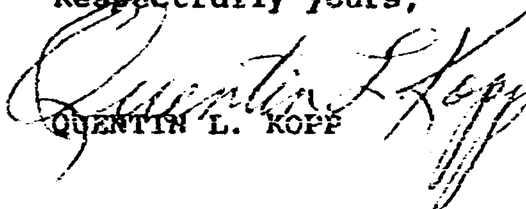
SB 933 also prohibits "forum shopping" by requiring that all search and seizure motions in a case be heard by the same judge, if that judge is available.

The measure is sponsored by the Los Angeles District Attorney, and is supported by the California Peace Officers Association and the California Police Chiefs Association. SB 933 was approved by the State Assembly on August 26th, 74-0, and by the State Senate on September 1st, 27-1.

Hon. Pete Wilson
September 7, 1993
Page Two

I sincerely ask for your approval and signature on SB 933.

Respectfully yours,



QUENTIN L. KOPP

QLK:jm
Enclosure

STATE OF CALIFORNIA
OCJP 855 (4/92)

OFFICE OF CRIMINAL JUSTICE PLANNING

ENROLLED BILL REPORT

Department	Author	Bill Number
OFFICE OF CRIMINAL JUSTICE PLANNING	Kopp	SB 933

Summary

This bill will permit the prosecutor to refile a case after the defendant has won a motion to suppress evidence and as a result the case is either dismissed by the judge or voluntarily dismissed by the prosecutor. Therefore, this bill allows the state another opportunity to litigate the suppression issue.

Summary of Support

This bill merely returns the law to the status quo prior to the California Supreme Court's decision in *Schlick v. Superior Court*, 4 Cal.4th 310 (1992). Since refiling is permissible if a case is dismissed at the preliminary hearing stage, refiling should not be prohibited merely because it occurs as a result of a successful suppression motion at a special pre-trial hearing. Prosecutors are often "ambushed" by defense claims at such hearings and may not have the information or witnesses to successfully resist defense suppression motions at this stage. It is unjust to permit serious criminals to escape justice merely because their attorneys were able to catch the prosecutor unprepared at an early stage. Multiple refilings would be [illegible]air to the defendant. However, this bill's two relitigation limit strikes an appropriate compromise position.

Specific Findings

Under existing law, in felony cases defendants may raise a motion to suppress evidence or return wrongfully seized property which may be made at the preliminary hearing or at a special evidentiary hearing called for this purpose. If the defendant's motion to suppress at a special hearing is granted, the prosecution has the option of appealing (if it has grounds to do so on the basis that an incorrect legal standard was applied) or attempting to show good cause at trial why the decision at the special hearing should not be binding -- such as the existence of new evidence in opposition to the defense motion that was not reasonably obtainable at the time of the special hearing. In *Schlick v. Superior Court* (cited *supra*), the California Supreme Court held, as a matter of statutory interpretation, that the prosecution may only seek the above two remedies (appeal and good cause) if it loses a suppression motion. The prosecution is thus barred from refiling a case under these circumstances if it has no grounds for appeal and cannot make the requisite good cause showing. (This would be the case, for example, where the motion was granted because of conclusory statements by the defense that there was not probable cause for the issuance of the warrant which the prosecution was unable to rebut

Recommendation

SIGN

Legislative Analyst	Date	Deputy Director	Date
[signature]	9-8-93	[signature]	9-9-93

Executive Director	Date
[signature]	9-9-93

000060

because it failed to have the necessary witnesses available.) In these circumstances, the Supreme Court held, if the case is dismissed either voluntarily by the prosecution or by the judge, the defendant cannot be re-prosecuted for the same offense. However, under current law the prosecutor could refile charges if the evidence was suppressed at a preliminary hearing.

This bill will permit the prosecution to refile charges against a defendant whose case was dismissed (voluntarily or not) as a result of a successful motion to suppress evidence. However, the prosecution may not request relitigation of a motion to suppress evidence if the defendant's motion to suppress has been granted twice. This prohibition also applies to preliminary hearing dismissals. The prosecution may only re-litigate a third time if the prosecution discovers new evidence relating to the motion that was not reasonably discoverable at the time of the prior hearing. This bill requires that, if available, relitigation of suppression motions shall be heard by the judge who granted the motion at the first hearing. This bill includes statements of legislative intent that the bill's provisions are not intended to be used as a vehicle for forum shopping.

Analysis

This bill would restore the status quo prior to the *Schlick* case. It prevents the defense from having a procedural advantage in raising suppression motions in special hearings instead of at a preliminary hearing. This bill rectifies this by providing a cap on relitigation to two re-litigations -- i.e., the prosecution gets at most three tries to fight a suppression motion. After that, the charges may be refiled only if the state has new evidence relating to the suppression motion that was not reasonably discoverable before. This is a fair compromise. Prosecutors, especially in our larger cities are often overworked. They must juggle cases and deal with an ever changing calendar. Even very competent attorneys may be surprised by defense claims that evidence should be suppressed. Often prosecutors have only a vague idea of what the defense will claim was the defect in the seizure of evidence. Prosecutors may thus be caught unprepared or without necessary witnesses. This should not prevent the prosecution from being able to re-litigate the motion by dropping the case and refiling. Since this is commonly done at the preliminary hearing stage, it is not unfair to expose defendants to this possibility after a dismissal as a result of a suppression motion at a special hearing. The Supreme Court's opinion in *Schlick* was based on statutory interpretation, not concepts of fairness or constitutional law, so this change is not barred. Therefore, this bill is an appropriate compromise and safeguard. It ensures that the prosecution will not be prevented from re-litigating evidentiary motions against clever defense attorneys who catch them occasionally unprepared. It also ensures that there are not procedural advantages for the defense to raise its suppression motions in one type of hearing instead of another. It also ensures that the prosecution will not be unfairly permitted to continue to harass defendants against whom the government has been unable to prevail in evidentiary hearings. The bill's provisions also discourage forum shopping -- by the defense or the prosecution. Therefore this bill is a useful modification of current law.

Support

Los Angeles District Attorney (Source)
Legislative Oversight Committee
California Peace Officers' Association
California Police Chiefs' Association

Opposition

California Attorneys for Criminal Justice
The Judicial Council of California

Status

Date	Action	Vote
• 3-4-93	Introduced	
• 5-11-93	Passed Senate Judiciary Committee	(10-1)
• 5-28-93	Passed Senate Floor	(33-1)
• 7-13-93	Passed Assembly Public Safety Committee	(7-0)
• 8-26-93	Passed Assembly Floor	(74-0)
• 9-1-93	Senate Concurs in Assembly Amendments	(27-1)
• 9-1-93	Enrolled	

Recommendation

SIGN

Analyst Name: Sharon Loer
Phone No: 322-4916

ATE AND CONSUMER SERVICES AGENCY — NO ENROLLED BILL REPORT REQUIRED

ARTMENT	AUTHOR	BILL NUMBER
ENERAL SERVICES	Kopp	SB 933

Technical bill - No program or fiscal changes to existing program. No analysis required. No recommendation on signature.

Bill as enrolled no longer within scope of responsibility or program of this Department.

This bill makes various changes to current law regarding the suppression of evidence. This bill would allow the people to file a new complaint or seek an indictment if the case has been dismissed by either the court or by the people. In such cases, if a ruling was made at a special hearing of the superior court to suppress evidence or return property, that ruling would not be binding on any subsequent hearing.

This bill would not alter any procedures followed by the California State Police (CSP) regarding searches and seizure of property. Therefore, this bill would not impact CSP and the Department of General Services does not make a recommendation.

Virginia S. Douglas
Assistant Director - Legislation
Leg. Phone: 445-3946

ECOMMENDATION

NONE

DEPARTMENT DIRECTOR	DATE	AGENCY SECRETARY	DATE
[signature]	9/8/93	[signature]	9/9/93

000063

NO ENROLLED BILL REPORT REQUIRED Business, Transportation and Housing Agency

DEPARTMENT	AUTHOR	BILL NUMBER
California Highway Patrol	Kopp	SB 933
SUBJECT		DATE LAST AMENDED
Search Warrants: Motions to Suppress Evidence		As Introduced 3-4-93

[X] No Concern

[ ] Technical bill - No program or fiscal changes to existing program. No analysis required. No recommendations on signature.

[ ] Bill as enrolled no longer within scope of responsibility or program of this Department.

Comments:

The Attorney General acts as the California Highway Patrol's attorney, and, therefore, we defer to the Department of Justice.

Prepared by: Dorothy O'Neil
Title: AGPA
Phone No.: 657-7249

DEPARTMENT	DATE	AGENCY	DATE
California Highway Patrol	9-8-93		9/10/93

Analyst Name: Dennis Weber
Phone Number: 322-[illegible]3

TATE AND CONSUMER SERVICES AGENCY

ENROLLED BILL REPORT

EPARTMENT	AUTHOR	BILL NUMBER
onsumer Affairs	Kopp	SB 933

LL SUMMARY

:isting law permits a motion to suppress (MTS) evidence at a special hearing the superior court. If the motion is granted, the prosecution's options e: 1) if the prosecution has additional evidence relating to the MTS and can ow good cause why such evidence was not presented, the prosecution may then esent that evidence and seek to have the prior ruling overturned; 2) the osecution may seek appellate review. The prosecution cannot simply refile d relitigate the MTS of a case dismissed as a result of an adverse ruling on MTS in the superior court.

933 provides that the prosecution be entitled to file a new complaint or ek an indictment and start a felony prosecution anew if the case is dismissed the judge or on a motion by the prosecution after a defendant's MTS is anted at a special hearing of the superior court.

e bill provides that the relitigation of the MTS would be heard by the same dge who granted the motion at the first hearing, if available. The bill also ecifies the prosecution cannot file a new complaint or seek a new indictment relitigate a MTS that has been granted twice in a felony case, unless the osecution discovers evidence relating to the motion that was not reasonably scoverable at the time of the second MTS hearing.

e bill declares Legislative intent that the provisions of this bill shall not viewed as encouragement to forum shop.

CKGROUND

cording to the sponsor, the Los Angeles County District Attorney (LACDA), is bill is needed to correct an anomaly in the law caused by the California preme Court decision in Schlick v. Superior Court. Prior to that case, if defense challenged the lawfulness of search in a felony case, the osecution had up to four opportunities to show the search was legal, two at preliminary hearing in municipal court and two at the special pretrial aring in the superior court. As a result of the Schlick case, which relied on the language of Penal Code Section 1538.5, the prosecution now has either many as three opportunities to show that a challenged search is legal, if challenge is first brought at the preliminary hearing, or only one portunity if the challenge is first brought in superior court.

Vote: ASSEMBLY			Vote: SENATE		
loor:	Aye 74	No 0	Floor:	Aye 33	No 1
licy Committee:	Aye 7	No 0	Policy Committee:	Aye 10	No 1
scal Committee:	Aye NA	No	Fiscal Committee:	Aye NA	No

COMMENDATION TO GOVERNOR: SIGN X VETO

DEFER TO OTHER AGENCY

EPARTMENT DIRECTOR: DATE: [signature] 9/8/93

AGENCY SECRETARY: [signature] DATE: 9/9/93

EBR 11/91

000065

This bill would simplify Penal Code 1538.5 so that the prosecution will have two opportunities to show that a challenged search was legal regardless of whether the challenge to the search was first brought in the municipal court or the superior court.

SPECIFIC FINDINGS

The LACDA states the ability to refile after losing an MTS motion in superior court is necessary to keep criminal defendants from having cases dismissed because overworked prosecutors are unable to present the People's evidence in the most effective manner at a given hearing. The LACDA states prosecutors are occasionally "ambushed" by defense attorneys with unanticipated grounds for the motion or unanticipated witnesses which the prosecutor cannot overcome in its presentation to show the search was legal.

According to the LACDA, "The right to refile and relitigate the 1538.5 motion - even if it means admitting we did a bad job the first time - is better than the irredeemable dismissal of an important case."

The California Attorneys for Criminal Justice state this bill would encourage forum shopping, the practice of seeking a venue perceived to be more favorable, and would create delays in proceedings without any real benefit.

The LACDA states the courts are aware of the problems caused by forum shopping and have devised procedures to prevent it. In addition, amendments to SB 933, which specify the intent of the Legislature, shall not be construed to be a means to forum shop and provides the relitigation of a MTS should be heard by the same judge who granted the motion at the first hearing if available.

FISCAL IMPACT

This is not a fiscal bill.

INTERESTED PARTIES

Support:	Los Angeles County District Attorney (sponsor) California Peace Officer's Association California Police Chief's Association
Opposition:	California Attorneys for Criminal Justice

ARGUMENTS

Proponents argue this bill provides the prosecution with the additional remedy of refiling a case after the case is dismissed because the defendant was granted a suppression motion at a special hearing of the superior court.

Opponents argue this bill would encourage forum shopping and would delay proceedings without any real benefit.

RECOMMENDATION

The Department of Consumer Affairs recommends that the Governor SIGN SB 933.

UNFINISHED BUSINESS

SENATE RULES COMMITTEE		
Office of Senate Floor Analyses 1020 N Street, Suite 524 445-6614	Bill No.	SB 933
	Author:	Kopp (I)
	Amended:	8/16/93
	Vote Required:	21

Committee Votes:

Senate Floor Vote: p. 1400, 5/28/93

COMMITTEE: JUDICIARY		
BILL NO.: SB 933		
DATE OF HEARING: 5-11-93		
SENATORS:	AYE	NO
Calderon	✓	
[illegible]	✓	
Marks	✓	
Petris	✓	
Presley	✓	
Roberti		✓
Torres	✓	
Watson	✓	
Wright	✓	
Leslie (VC)	✓	
Lockyer (CH)	✓	
TOTAL:	10	1

Senate Bill 933—An act to amend Section 1538.5 of the Penal Code, relating to search warrants.

Bill read third time and presented by Senator Kopp.

Roll Call

The roll was called and the bill was passed by the following vote:

AYES (33)—Senators Alquist, Ayala, Bergeson, Beverly, Calderon, Craven, Dills, Greene, Hart, Hill, Hughes, Hurtt, Kelley, Killea, Kopp, Leonard, Leslie, Lewis, Lockyer, Maddy, Marks, McCorquodale, Mello, Petris, Presley, Rogers, Rosenthal, Russell, Thompson, Torres, Watson, Wright, and Wyman.

NOES (1)—Senator Roberti.

Bill ordered transmitted to the Assembly.

Assembly Floor Vote: 74-0, 8/26/93

SUBJECT: Motions to suppress evidence

SOURCE: Los Angeles District Attorney

DIGEST: This bill provides that the prosecution be entitled to file a new complaint or seek an indictment after the defendant's motion to return property or suppress evidence is granted at a special hearing of the superior court.

Assembly Amendments provide that relitigation of a specified motion must be heard by the same judge, if possible.

ANALYSIS: Existing law permits a motion to suppress evidence at a special hearing in superior court. If the motion is granted, and if the prosecution has additional evidence relating to the motion and not presented at the special hearing, the prosecution may show good cause at the trial why the ruling at the special hearing should not be binding. Alternatively, the prosecution may seek appellate review as long as the case has not already been dismissed.

First of all, this bill specifies that the intent of the Legislature, through this legislation, shall not be construed as a means to forum shop.

This bill would additionally authorize the prosecution to file a new complaint if the case is dismissed by the judge or if the prosecution dismissed the case on its own motion after the special hearing. In that situation, the ruling at the special hearing would not be binding in the new action.

CONTINUED

The bill specifies that, if a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing in the superior court, unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if that judge is available.

The purpose of this bill is to allow the prosecution another chance after losing a motion to suppress evidence at a special hearing in superior court when good cause or the basis for appellate review does not exist.

According to the sponsor, a recent Supreme Court case, Schlick v. Superior Court (December 17, 1992) 4 Cal.4th 310, interpreting Penal Code Section 1538.5, "held that the prosecution cannot simply dismiss the case and refile it and start all over again but must instead pursue the relitigation or appellate procedures set forth in 1538.5 - even if the case had not previously been dismissed and refiled. The Court cited as the basis of this holding the language of PC 1538.5 itself.

"The problem with this decision is that we can now suffer the permanent dismissal of a felony case simply because we did a poor job in presenting our evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j) does permit us to seek to renew a 1538.5 motion first made at the special hearing in the superior court and present new evidence if we can show good cause as to why that evidence wasn't presented at the first hearing. But very often the reason we didn't do a good job at the first hearing was simply that due to the press of cases our deputy was not sufficiently prepared, or did not subpoena an essential witness, or an essential witness did not appear. These reasons would not be considered good cause to renew the hearing but do occur with some frequency. ... The right to refile and relitigate the 1538.5 motion - even if it means admitting we did a bad job the first time - is better than the irredeemable dismissal of an important case".

When the defendant's motion to suppress evidence is granted at a preliminary hearing on a felony offense, and when the defendant is not held to answer in superior court, "the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding", Penal Code Section 538.5, subdivision (j).

The language of this bill parallels that language.

When the defendant's motion to suppress evidence is granted at a preliminary hearing on a felony offense, and when the defendant is held to answer in superior court, "the ruling at the preliminary hearing shall be binding upon the people" unless the prosecution requests a special hearing in superior court.

FISCAL EFFECT: Appropriation: No Fiscal Committee: No Local: No

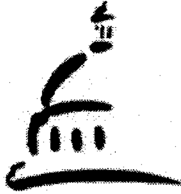
SUPPORT: (Verified 8/26/93)

Los Angeles District Attorney (source)
Legislative Oversight Committee

CONTINUED

ARGUMENTS IN SUPPORT: According to the sponsor, the purpose of this bill is to provide the prosecution with the additional remedy of refiling a case after the case is dismissed because the defendant was granted a suppression motion at a special hearing of the superior court.

RJG:lm 8/26/93 Senate Floor Analyses



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Senate Committee on Judiciary

SOURCE:
CALIFORNIA STATE ARCHIVES

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1993-94 Regular Session

SB 933 (Kopp)
As introduced
Hearing date: May 11, 1993
Penal Code
LGK

WORKING COPY
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MOTIONS TO SUPPRESS EVIDENCE

HISTORY

Source: Los Angeles District Attorney

Prior Legislation: AB 2328 (1986) - Chaptered

Support: No known

Opposition: California Attorneys for Criminal Justice

KEY ISSUES

SHOULD THE PROSECUTION BE ENTITLED TO FILE A NEW COMPLAINT OR SEEK AN INDICTMENT AFTER THE DEFENDANT'S MOTION TO RETURN PROPERTY OR SUPPRESS EVIDENCE IS GRANTED AT A SPECIAL HEARING OF THE SUPERIOR COURT?

IN SUCH A CASE, SHOULD THE RULING AT THE SPECIAL HEARING NOT BE BINDING IN A SUBSEQUENT PROCEEDING?

PURPOSE

Existing law permits a motion to suppress evidence at a special hearing in superior court. If the motion is granted, and if the prosecution has additional evidence relating to the motion and not presented at the special hearing, the prosecution may show good cause at the trial why the ruling at the special hearing should not be binding. Alternatively, the prosecution may seek appellate review as long as the case has not already been dismissed.

(More)

This bill would additionally authorize the prosecution to file a new complaint if the case is dismissed by the judge or if the prosecution dismissed the case on its own motion after the special hearing. In that situation, the ruling at the special hearing would not be binding in the new action.

The purpose of this bill is to allow the prosecution another chance after losing a motion to suppress evidence at a special hearing in superior court when good cause or the basis for appellate review does not exist.

COMMENT

1. Expressed purpose of the bill

According to the sponsor, the purpose of this bill is to provide the prosecution with the additional remedy of refiling a case after the case is dismissed because the defendant was granted a suppression motion at a special hearing of the superior court. According to the sponsor, a recent Supreme Court case, Schlick v. Superior Court (December 17, 1992) 4 Cal.4th 310, interpreting Penal Code Section 1538.5,

> held that the prosecution cannot simply dismiss the case and refile it and start all over again but must instead pursue the relitigation or appellate procedures set forth in 1538.5 - even if the case had not previously been dismissed and refiled. The Court cited as the basis of this holding the language of PC 1538.5 itself.
>
> The problem with this decision is that we can now suffer the permanent dismissal of a felony case simply because we did a poor job in presenting our evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j) does permit us to seek to renew a 1538.5 motion first made at the special hearing in the superior court and present new evidence if we can show good cause as to why that evidence wasn't presented at the first hearing. But very often the reason we didn't do a good job at the first hearing was simply that due to the press of cases our deputy was not sufficiently prepared, or did not subpoena an essential witness, or an essential witness did not appear. These reasons would not be considered good cause to renew the hearing but do occur with some frequency. ... The right to refile and relitigate the 1538.5 motion - even if it means admitting we did a bad job the first time - is better than the irredeemable dismissal of an important case.

(More)

2. Compare to dismissal at preliminary hearing

When the defendant's motion to suppress evidence is granted at a preliminary hearing on a felony offense, and when the defendant is not held to answer in superior court, "the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding", Penal Code Section 538.5, subdivision (j).

The language of this bill parallels that language.

When the defendant's motion to suppress evidence is granted at a preliminary hearing on a felony offense, and when the defendant is held to answer in superior court, "the ruling at the preliminary hearing shall be binding upon the people" unless the prosecution requests a special hearing in superior court.

3. People's ability to relitigate the suppression motion

This bill and existing law would permit the following scenario:

A defendant's motion for suppression of evidence is granted at the preliminary hearing (first time), and the defendant is held to answer in superior court.

The prosecution then notifies the defendant and the court within 15 days and requests a special hearing in superior court. At the special hearing, the validity of the search is relitigated de novo, and the superior court grants the defendant's motion (second time).

The prosecution then dismisses the case on its own motion after the special hearing and files a new complaint. At the preliminary hearing, the two prior rulings for the defendant are not binding and the defendant must move to suppress the evidence for the third time.

If the defendant's third suppression motion is granted, the people may move for a special hearing, for the forth hearing on suppression.

This ability to relitigate suppression motions is undoubtedly not intended by the sponsor.

SHOULD THE MAXIMUM NUMBER OF SUPPRESSION HEARINGS BE LIMITED TO TWO?

The Schlick Court, citing an earlier case, noted that the legislative intent underlying Section 1538.5:

(More)

was to reduce the unnecessary waste of judicial time and effort involved in the prior procedures, whereby search and seizure questions could be repeatedly raised in criminal proceedings. [Citations.] Our interpretation of section 1538.5, subdivision (d), is consistent with the foregoing description of legislative intent, precluding the People from relitigating suppression issues presumably already fully and completely litigated in superior court.

4. Opposition

California Attorneys for Criminal Justice is opposed to this bill because it would allow prosecutors to "take another shot" with another judge after losing a suppression motion in superior court. CACJ believes that the bill would encourage forum shopping and delay proceedings without any real benefit.

****

STATE OF CALIFORNIA

OFFICE OF LEGISLATIVE COUNSEL

COPY

March 30, 1993

Honorable Quentin L. Kopp

S.B. 933 — Conflict

The above measure, introduced by you, which is now set for hearing in the Senate Judiciary Committee

appears to be in conflict with the following other measure(s):

A.B. 1215 - Rainey

ENACTMENT OF THESE MEASURES IN THEIR PRESENT FORM MAY GIVE RISE TO A SERIOUS LEGAL PROBLEM WHICH PROBABLY CAN BE AVOIDED BY APPROPRIATE AMENDMENTS.

WE URGE YOU TO CONSULT OUR OFFICE IN THIS REGARD AT YOUR EARLIEST CONVENIENCE.

Very truly yours,
BION M. GREGORY
Legislative Counsel

By: Corrections Section
Ph. 5-0430

cc: Committee named above
Each lead author concerned

Printed on Recycled Paper

California Attorneys for Criminal Justice

CACJ

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John Yzurdiaga, Torrance
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Ephraim Margolin, San Francisco, 1974
Paul J. Fitzgerald, Beverly Hills, 1975
George W. Porter, Ontario, 1976
Louis S. Katz, San Francisco, 1977
Harry Tarlow, Los Angeles 1978
Charles R. Garry (deceased), 1979
Charles M. Sevilla, San Diego, 1980
Dennis Roberts, Oakland, 1981
John J. Cleary, San Diego, 1982
Gerald F. Uelmen, Santa Clara, 1983
Michael G. Millman, San Francisco, 1984
Robert Berke, Los Angeles, 1985
Alex Landon, San Diego, 1986
Richard G. Hirsch, Santa Monica, 1987
Thomas J. Nolan, Palo Alto, 1988
Leslie H. Abramson, Los Angeles, 1989
Elisabeth Semel, San Diego, 1990
Michael Rothschild, Sacramento, 1991
LEGISLATIVE ADVOCATE
Melissa K. Nappan
660 "J" Street, Suite 200
Sacramento, CA 95814
(916) 448-8868

Senator Quentin Kopp
State Capitol - Room 2057
Sacramento, CA 95814

May 6, 1993 Re: SB 933

Dear Senator Kopp:

CACJ regrets to inform you of our opposition to SB 933, relating to motions to suppress.

SB 933 proposes that where a court has dismissed a case in the interest of justice, that a prosecutor may refile and "take another shot" with another judge. CACJ thinks that this proposal would encourage forum shopping and delay proceedings without any real benefit, and must therefore oppose passage of this bill.

If you or your staff wish to discuss this matter further, please contact me at my office.

Very truly yours,

Melissa K. Nappan
Legislative Advocate

cc: Members and consultants,
Senate Judiciary Committee

10551 Jefferson Boulevard
Culver City, CA 90232
Phone: (310) 204-0502
Fax: (310) 204-2438

SENATE JUDICIARY COMMITTEE
BACKGROUND INFORMATION
5-5957

SB933

Please complete this form and return it to the Senate Judiciary Committee, Room 2032, as soon as possible. Your bill cannot be heard until this form is returned. **PLEASE CALL AS SOON AS POSSIBLE TO SET YOUR BILL.**

1. Who on your staff is responsible for this measure?

   David Smith (445-0503)

2. Which agency, organization or individual requested the introduction of this bill?

   Name: LA District Attorney

   Contact Person: Richard Chrystie (213) 974-1641 - LA DA
   Jim Provenza 442-0668 - Leg. Advocate for LA DA

   Phone number:

3. Which agencies, organizations, or individuals (outside of the sponsor) have expressed support?

4. Which agencies, organizations or individuals have expressed opposition?

5. If a similar bill has been introduced in a previous session, what was the number and year of its introduction?

6. What problem or deficiency under current law does the bill seek to remedy?

   Please see attached

7. Are you planning any amendments to be offered before the Committee hearing?

   Not at this time.

If you have any further background information or material relating to this measure (letters of support or opposition, reports, opinions, citations, etc.) please attach copies or state where such information is available.

Your cooperation is appreciated.

GIL GARCETTI
LOS ANGELES COUNTY DISTRICT ATTORNEY

18000 CRIMINAL COURTS BUILDING 210 WEST TEMPLE STREET LOS ANGELES CA 90012 3210 (213) 974 3501

ENCLOSED IS A LEGISLATIVE PROPOSAL FROM THE OFFICE OF THE LOS ANGELES COUNTY DISTRICT ATTORNEY

In response to a request from District Attorney Gil Garcetti, our deputies have submitted proposals for legislation. Enclosed is such a proposal which the District Attorney believes would be beneficial in addressing current crime issues.

Included in the packet is a short summary of the legislative proposal and/or an intra-office communication in which the deputy explains the need for the legislation, and a draft of suggested language for the new or amended statute. In some cases there may also be copies of other related statutes, case law, or similar supporting documents.

Thank you for your consideration of this legislative proposal. If you have questions about it, please call either of the following individuals:

Sandra L. Buttitta,
Chief Assistant District Attorney
Los Angeles County
(213) 974-3505

Margaret Barreto-Morehouse
Deputy District Attorney
Special Assistant to Ms. Buttitta
(213) 974-3500

Jim Provenza - Lobbyist
442-0668
FAX 445-1424

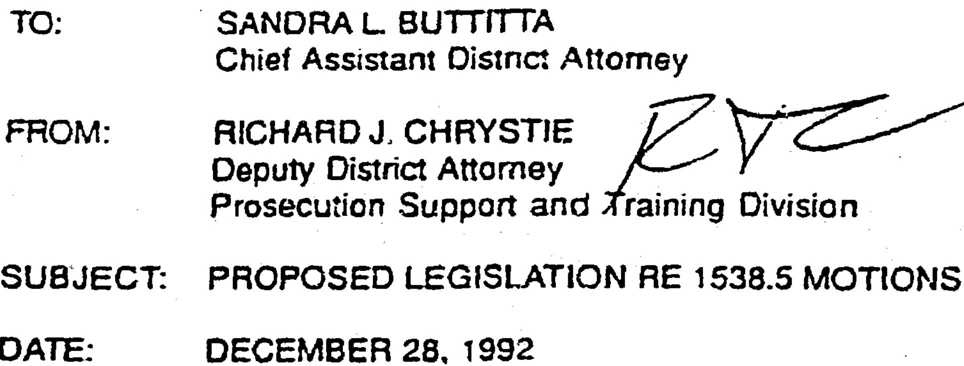
Richard Chrystie will probably testify.

1/93

MOTIONS TO SUPPRESS EVIDENCE:

Penal Code Section 1538.5: Amend section (j) of statute to allow D.A. to dismiss and refile cases upon court's granting of suppression motion brought in Superior Court, as D.A. is permitted to do upon granting of suppression motion brought in Municipal Court. Under current law D.A. is required to pursue appellate remedies when suppression motion is brought and granted in Superior Court.

MEMORANDUM



TO: SANDRA L. BUTTITTA
Chief Assistant District Attorney

FROM: RICHARD J. CHRYSTIE
Deputy District Attorney
Prosecution Support and Training Division

SUBJECT: PROPOSED LEGISLATION RE 1538.5 MOTIONS

DATE: DECEMBER 28, 1992

This is in response to your memorandum requesting legislative proposals.

A recent decision of the California Supreme Court, Schlick v. Superior Court, Met. News Slip Opinion Supplement, Dec. 21, 1992, considered the issue of remedies available to the prosecution when a Penal Code section 1538.5 motion is granted and evidence is suppressed resulting in the dismissal of a felony case. This case first approved prior decisions holding that if a 1538.5 motion is granted and a felony dismissed in the municipal court at the preliminary hearing stage, the prosecution can simply refile the case and start all over again - among other remedies. However, in reference to the facts of the Schlick case itself, where the suppression motion was made and granted at the "special hearing" in the superior court pursuant to PC 1538.5, subd. (i), the Supreme Court held that the prosecution cannot simply dismiss the case and refile it and start all over again but must instead pursue the relitigation or appellate procedures set forth in 1538.5 - even if the case had not previously been dismissed and refiled. The Court cited as the basis of this holding the language of PC 1538.5 itself.

The problem with this decision is that we can now suffer the permanent dismissal of a felony case simply because we did a poor job in presenting our evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j) does permit us to seek to renew a 1538.5 motion first made at the special hearing in the superior court and present new evidence if we can show good cause as to why that evidence wasn't presented at the first hearing. But very often the reason we didn't do a good job at the first hearing was simply that due to the press of cases our deputy was not sufficiently prepared, or did not subpoena an essential witness, or an essential witness did not appear. These reasons would not be considered good cause to renew the hearing but do occur with some frequency.

To solve this problem, I suggest legislation allowing us to simply dismiss and refile a felony case in the event a 1538.5 motion is granted in the superior court and the only way we can correctly present our evidence at the 1538.5 motion is to start all over again. Naturally, this is not something we would want to do often since by such dismissal and refiling we are, in essence, admitting that we did an inexcusably poor job the first time. But since the law does permit us to do this if we lose a 1538.5 motion at the preliminary hearing stage of a case, and since if the Schlick case stands as it is it will be the single exception to our right to refile a felony matter after suffering one dismissal, I think we are justified in asking for legislation allowing us to dismiss and refile after losing a 1538.5 motion in the superior court. The right to refile and relitigate the 1538.5 motion - even if it means admitting we did a bad job the first time - is better than the irredeemable dismissal of an important case.

Here's my suggested amendment to 1538.5:

The language appearing in underline should be inserted within subsection (j):

"If defendant's motion is granted at the special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385 or if the people dismiss the case on their own motion the people may file a new complaint or seek an indictment and the ruling at the special hearing shall not be binding in any subsequent proceeding. If the property . . .[etc]."

This new language parallels existing language within subsection (j) which permits the refiling of a felony when it is dismissed as a result of the granting of a 1538.5 motion at the preliminary hearing stage.

Please call me if you wish further explanation of this proposal.

c: Abram Weisbrot
Curtis A. Hazell

§ 1538.5. Motion to return property or suppress evidence

(a) *Grounds.* 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 on either of the following grounds:

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

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

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

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

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

(e) *Return of property.* If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5, or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) *Felony; motion upon filing information in superior court or at preliminary hearing in municipal or justice court.* If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that the defendant may make the motion at the preliminary hearing in the municipal or justice court but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

(g) *Misdemeanor; pre-trial motion at special hearing.* If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

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

(i) *Felony; renewal of motion at special hearing; review.* If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence which could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) *Relitigation of question after grant of motion; new evidence; review.* If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and

upon the filing of an information, the people within 15 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (*o*), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

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

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

(l) Stay; time for trial; dismissal; continuance; bail or release. If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (*o*), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318.

(m) Exclusive pre-trial remedy; review on appeal after conviction. The proceedings provided for in this section, Section 871.5, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds; existing law and procedure. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 871.5 or 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) People's petition for mandate or prohibition; notice of intention. Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant. *(Added by Stats.1967, c. 1537, § 1. Amended by Stats.1970, c. 1289, § 2; Stats.1970, c. 1441, § 1.5; Stats.1977, c. 137, § 1; Stats.1982, c. 625, § 1; Stats.1982, c. 1505, § 6; Stats.1986, c. 52, § 1; Stats.1987, c. 828, § 99.)*

Section 2 of Stats.1982, c. 625, provides:

"The amendment of Section 1538.5 of the Penal Code by this act does not create any new grounds for exclusion of evidence that did not exist prior to this act. The Legislature intends that the changes made by this act are procedural only."

Section 2 of Stats.1986, c. 52, provides:

"The Legislature hereby declares that the amendment to Section 1538.5 of the Penal Code made in Section 1 of this act does not create any new grounds for the exclusion of evidence that did not exist prior to the effective date of this act. It is the intent of the Legislature that the changes made in that section are procedural only."

Cross References

Appeal by people, see § 1238.
Appeal from municipal and justice courts in criminal cases, see California Rules of Court, Rule 182 et seq.
Dismissal for failure to file information or bring case to trial within time limits, see § 1382.
Dismissal on motion of judge, magistrate or prosecutor, see § 1385.
Disqualification of judges, see Code of Civil Procedure §§ 170, 170.6.
Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.
Forfeiture of personal property for controlled substances violations, vesting of property in state, see Health and Safety Code § 11470.
Freedom of speech and press, see U.S.C.A. Const. Amend. 1; Const. Art. 1, § 2.
Homicide and other crimes against the person, see § 187 et seq.
Judgments and orders appealable from inferior courts, see § 1466.
Prohibition of unreasonable search and seizure, see U.S.C.A. Const. Amend. 4; Const. Art. 1, § 13.
Release on own recognizance, see § 1318 et seq.
Setting aside indictment or information, see § 995.
Traverse of grounds for issuance of warrant, testimony, deposition, see § 1539.
Writ of mandate, see Code of Civil Procedure § 1084 et seq.
Writ of prohibition, see Code of Civil Procedure § 1102 et seq.

GIL GARCETTI
LOS ANGELES COUNTY DISTRICT ATTORNEY

18000 CRIMINAL COURTS BUILDING 210 WEST TEMPLE STREET LOS ANGELES, CA 90012-3210 (213) 974-3501

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Kopp
SB933

ENCLOSED IS A LEGISLATIVE PROPOSAL FROM THE OFFICE OF THE LOS ANGELES COUNTY DISTRICT ATTORNEY

In response to a request from District Attorney Gil Garcetti, our deputies have submitted proposals for legislation. Enclosed is such a proposal which the District Attorney believes would be beneficial in addressing current crime issues.

Included in the packet is a short summary of the legislative proposal and/or an intra-office communication in which the deputy explains the need for the legislation, and a draft of suggested language for the new or amended statute. In some cases there may also be copies of other related statutes, case law, or similar supporting documents.

Thank you for your consideration of this legislative proposal. If you have questions about it, please call either of the following individuals:

Sandra L. Buttitta,
Chief Assistant District Attorney
Los Angeles County
(213) 974-3505

Margaret Barreto-Morehouse
Deputy District Attorney
Special Assistant to Ms. Buttitta
(213) 974-3500

1/93

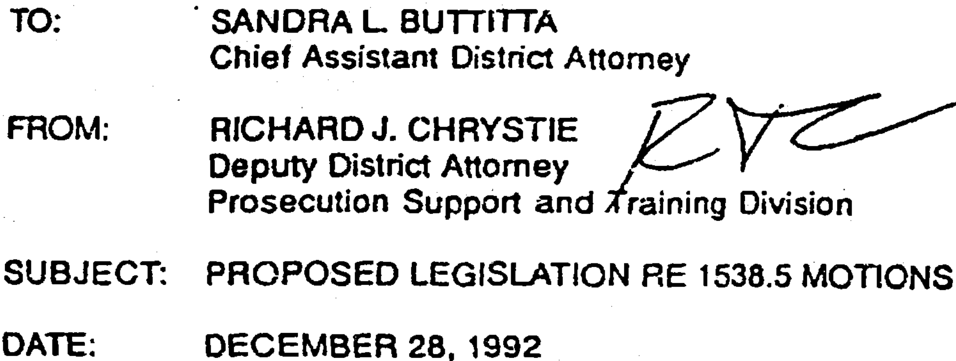
MOTIONS TO SUPPRESS EVIDENCE:

Penal Code Section 1538.5: Amend section (j) of statute to allow D.A. to dismiss and refile cases upon court's granting of suppression motion brought in Superior Court, as D.A. is permitted to do upon granting of suppression motion brought in Municipal Court. Under current law D.A. is required to pursue appellate remedies when suppression motion is brought and granted in Superior Court.

MEMORANDUM

TO: SANDRA L. BUTTITTA
Chief Assistant District Attorney

FROM: RICHARD J. CHRYSTIE
Deputy District Attorney
Prosecution Support and Training Division



SUBJECT: PROPOSED LEGISLATION RE 1538.5 MOTIONS

DATE: DECEMBER 28, 1992

This is in response to your memorandum requesting legislative proposals.

A recent decision of the California Supreme Court, Schlick v. Superior Court, Met. News Slip Opinion Supplement, Dec. 21, 1992, considered the issue of remedies available to the prosecution when a Penal Code section 1538.5 motion is granted and evidence is suppressed resulting in the dismissal of a felony case. This case first approved prior decisions holding that if a 1538.5 motion is granted and a felony dismissed in the municipal court at the preliminary hearing stage, the prosecution can simply refile the case and start all over again - among other remedies. However, in reference to the facts of the Schlick case itself, where the suppression motion was made and granted at the "special hearing" in the superior court pursuant to PC 1538.5, subd. (i), the Supreme Court held that the prosecution cannot simply dismiss the case and refile it and start all over again but must instead pursue the relitigation or appellate procedures set forth in 1538.5 - even if the case had not previously been dismissed and refiled. The Court cited as the basis of this holding the language of PC 1538.5 itself.

The problem with this decision is that we can now suffer the permanent dismissal of a felony case simply because we did a poor job in presenting our evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j) does permit us to seek to renew a 1538.5 motion first made at the special hearing in the superior court and present new evidence if we can show good cause as to why that evidence wasn't presented at the first hearing. But very often the reason we didn't do a good job at the first hearing was simply that due to the press of cases our deputy was not sufficiently prepared, or did not subpoena an essential witness, or an essential witness did not appear. These reasons would not be considered good cause to renew the hearing but do occur with some frequency.

To solve this problem, I suggest legislation allowing us to simply dismiss and refile a felony case in the event a 1538.5 motion is granted in the superior court and the only way we can correctly present our evidence at the 1538.5 motion is to start all over again. Naturally, this is not something we would want to do often since by such dismissal and refiling we are, in essence, admitting that we did an inexcusably poor job the first time. But since the law does permit us to do this if we lose a 1538.5 motion at the preliminary hearing stage of a case, and since if the Schlick case stands as it is it will be the single exception to our right to refile a felony matter after suffering one dismissal, I think we are justified in asking for legislation allowing us to dismiss and refile after losing a 1538.5 motion in the superior court. The right to refile and relitigate the 1538.5 motion - even if it means admitting we did a bad job the first time - is better than the irredeemable dismissal of an important case.

Here's my suggested amendment to 1538.5:

The language appearing in underline should be inserted within subsection (j):

"If defendant's motion is granted at the special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385 or if the people dismiss the case on their own motion the people may file a new complaint or seek an indictment and the ruling at the special hearing shall not be binding in any subsequent proceeding. If the property . . .[etc]."

This new language parallels existing language within subsection (j) which permits the refiling of a felony when it is dismissed as a result of the granting of a 1538.5 motion at the preliminary hearing stage.

Please call me if you wish further explanation of this proposal.

c: Abram Weisbrot
Curtis A. Hazell

§ 1538.5. Motion to return property or suppress evidence

(a) Grounds. 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 on either of the following grounds:

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

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

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

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

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

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

(f) Felony; motion upon filing information in superior court or at preliminary hearing in municipal or justice court. If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that the defendant may make the motion at the preliminary hearing in the municipal or justice court but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

(g) Misdemeanor; pre-trial motion at special hearing. If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

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

(i) Felony; renewal of motion at special hearing; review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence which could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) Relitigation of question after grant of motion; new evidence; review. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and

upon the filing of an information, the people within 15 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

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

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

(*l*) Stay; time for trial; dismissal; continuance; bail or release. If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318.

(m) Exclusive pre-trial remedy; review on appeal after conviction. The proceedings provided for in this section, Section 871.5, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds; existing law and procedure. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 871.5 or 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) People's petition for mandate or prohibition; notice of intention. Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant. *(Added by Stats.1967, c. 1537, § 1. Amended by Stats.1970, c. 1289, § 2; Stats.1970, c. 1441, § 1.5; Stats.1977, c. 137, § 1; Stats.1982, c. 625, § 1; Stats.1982, c. 1505, § 6; Stats.1986, c. 32, § 1; Stats.1987, c. 828, § 99.)*

Section 2 of Stats.1982, c. 625, provides:

"The amendment of Section 1538.5 of the Penal Code by this act does not create any new grounds for exclusion of evidence that did not exist prior to this act. The Legislature intends that the changes made by this act are procedural only."

Section 2 of Stats.1986, c. 32, provides:

"The Legislature hereby declares that the amendment to Section 1538.5 of the Penal Code made in Section 1 of this act does not create any new grounds for the exclusion of evidence that did not exist prior to the effective date of this act. It is the intent of the Legislature that the changes made in that section are procedural only."

Cross References

Appeal by people, see § 1238.

Appeal from municipal and justice courts in criminal cases, see California Rules of Court, Rule 182 et seq.

Dismissal for failure to file information or bring case to trial within time limits, see § 1382.

Dismissal on motion of judge, magistrate or prosecutor, see § 1385.

Disqualification of judges, see Code of Civil Procedure §§ 170, 170.6.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

Forfeiture of personal property for controlled substances violations, vesting of property in state, see Health and Safety Code § 11470.

Freedom of speech and press, see U.S.C.A. Const. Amend. 1; Const. Art. 1, § 2.

Homicide and other crimes against the person, see § 187 et seq.

Judgment and orders appealable from inferior courts, see § 1466.

Prohibition of unreasonable search and seizure, see U.S.C.A. Const. Amend. 4; Const. Art. 1, § 13.

Release on own recognizance, see § 1318 et seq.

Setting aside indictment or information, see § 995.

Traverse of grounds for issuance of warrant, testimony, deposition, see § 1539.

Writ of mandate, see Code of Civil Procedure § 1084 et seq.

Writ of prohibition, see Code of Civil Procedure § 1102 et seq.

EXHIBIT B

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

CRIMINAL RULES

RULE 1 GENERAL

A. SUPERVISING JUDGE – CRIMINAL

The Criminal Division of the Superior Court shall be supervised by a judge appointed by the Presiding Judge and designated as the Supervising Judge – Criminal.

B. CALENDAR CALL

(Eff. 1/01/11)

Except in Direct Calendar Departments, the Supervising Judge – Criminal or his/her designee shall call the Felony Master Trial Calendar, Felony Arraignment Calendar, Felony After-Arraignment Calendar and any other calendar he/she designates. These calendars shall be called in Department 24 at the Hall of Justice located at 190 West Hedding Street, San José, California. No probation violation matters, trailing sentencing matters, trailing misdemeanor cases, felonies still in limited jurisdiction or pretrial conference matters shall be set on the Master Trial Calendar, Arraignment Calendar or After Arraignment Calendar.

At the arraignment on the information or indictment regardless of location or calendar type, the following dates must be set after a plea of not guilty, including a plea of not guilty by reason of insanity, unless otherwise ordered for good cause:

(1) Trial, giving priority to a case entitled to it under law, and
(2) Filing and service of motions and responses and hearing thereon.

At the arraignment on the information or indictment regardless of location or calendar type, plea of not guilty must be entered if a defendant represented by counsel fails to plead or demur; and an attorney may not appear specially.

(Eff. 1/01/11)

C. MASTER TRIAL CALENDAR MOTIONS

Motions to restore, motions to advance, uncontested motions to consolidate and other motions pertaining to the Felony Master Trial Calendar shall be set and heard in the department of the Supervising Judge – Criminal.

D. MOTIONS TO CONSOLIDATE

Contested motions to consolidate shall be heard in the appropriate Law and Motion Department.

E. CALENDAR SCHEDULE

(1) HALL OF JUSTICE COURTHOUSE

The Felony Master Trial Calendar shall be called at 8:30 a.m. on Monday. The Felony Arraignment Calendar shall be called on Monday at 1:30 p.m. If Monday is a holiday, these two calendars shall be called on Tuesday at the above times. The Felony After-Arraignment Calendar shall be called at 1:30 p.m. on Wednesday. The deadline to place matters on the Felony After-Arraignment Calendar is noon on the Thursday immediately before the calendar is called, except for motions pursuant to Penal Code § 1050 which are governed by Rule 2.

(2) OTHER COURTHOUSES

Specific calendars for other courthouses will be as specified in the "Santa Clara County Superior Court Protocol" on file in the Clerk's Office of each courthouse and available in each courtroom in these facilities.

(Eff. 1/01/06)

(3) DRUG COURT CALENDARS

a. The Presiding Judge shall assign to the Criminal Division of the Superior Court a sufficient number of judges to serve at a designated courthouse to process all felony drug cases. Judges at this facility shall conduct all felony arraignments, pre-trial proceedings, settlement conferences, pleas and sentencing proceedings as well as the assignment of dates for preliminary examinations.

(Eff. 1/01/06)

b. The establishment of the Drug Court calendars is based upon the following statements:

(1) The Court receives a substantial number of narcotic cases each year that are recognized as a distinct subject within the Criminal Division.

(2) The establishment of the drug court calendars recognizes the need to incorporate substance abuse treatment programs where appropriate with criminal case processing in a timely and efficient manner.

(Eff. 7/26/00)

(3) The drug treatment court as approved in September of 1995 by the judges of the former Municipal and Superior Courts of Santa Clara County is recognized as a component of the Drug court calendars.

c. Schedules for the Drug Court calendars will be specified in the Santa Clara County Superior Court Protocol on file in the Clerk's Office.

d. Criteria for the assignment of cases to the Drug Court calendars, including the Drug Treatment Court, shall be specified in the Santa Clara County Superior Court Protocol on file in the Clerk's Office.

(Eff. 7/26/00)

(4) DOMESTIC VIOLENCE CALENDARS

The Presiding Judge shall assign to the Criminal Division of the Superior Court a sufficient number of judges to preside over felony and misdemeanor domestic violence cases in the Domestic Violence Court. The Domestic Violence Court will hear felony and misdemeanor domestic violence cases from arraignment through disposition and sentencing, and will hold hearings to monitor treatment progress and probation compliance.

(Eff. 1/1/08)

F. READINESS CONFERENCE

Except for those cases assigned to one judge for all purposes, a Readiness Conference for felony cases on the Master Trial Calendar shall be conducted at 9:00 a.m. on the judicial day immediately proceeding the day the Master Trial Calendar is called. The Readiness Conference shall be held in the chambers of the Supervising Judge – Criminal. A representative of the District Attorney's Office, Public Defender's Office, Alternative Defender's Office, and Independent Defender's Office is required to be present. Counsel is required to notify the Court of their trial readiness status at the Readiness Conference. This notification shall be made as follows:

(Eff. 1/01/11)

(1) Representatives of the various law offices mentioned above shall notify the Supervising Judge - Criminal of the status of those attorneys in their office. Trial Counsel is therefore expected to communicate their status to those representatives in advance of the Conference.

(Eff. 1/01/11)

(2) All counsel shall notify the Criminal Calendar Secretary of their trial readiness status no later than 3:30 p.m. on the day before the Readiness Conference.

(Eff. 1/01/11)

G. MISDEMEANORS – TRIALS AND PRETRIALS

(1) All cases, whether in-custody or out-of-custody, shall be set for a mandatory pretrial conference before being set on a jury trial calendar.

(2) The presence of counsel on all sides shall be mandatory at the pretrial conference.

(3) All discovery and all pretrial motions shall be completed before the matter is set for trial.

(Eff. 7/01/02)

H. COURTHOUSES

Adult criminal matters are filed and heard in the courthouses indicated below. Any case may be assigned to another courthouse for discussion, hearing and/or trial at the discretion of the Supervising - Criminal and/or Presiding Judge. If a Court employee or deputy sheriff working at a facility, or a member of his or her family, is a party to a case, the clerk or Supervising Judge - Criminal Division shall transfer the case to another facility, unless a statute specifies the location for the initial appearance and the party has not yet attended that initial appearance.

(Eff. 1/01/11)

(1) HALL OF JUSTICE COURTHOUSE

All misdemeanor, felony, and Municipal Code matters arising within Campbell, Los Gatos, Milpitas, Monte Sereno, San José, Santa Clara, and Saratoga and adjacent unincorporated areas are filed and heard in this courthouse, except drug offenses that are heard in the Terraine Courthouse.

(Eff. 1/01/06)

(2) TERRAINE COURTHOUSE

No criminal matters are filed in this Courthouse. All felony and misdemeanor drug offenses that would otherwise be heard in the Hall of Justice are heard in this Courthouse, except misdemeanor arraignments and trials.

(Eff. 7/01/12)

(3) SOUTH COUNTY COURTHOUSE

All misdemeanor, felony, and Municipal Code matters designated in the Criminal Local Bail Schedule arising in Gilroy, Morgan Hill, and San Martin and adjacent unincorporated areas are filed and heard in this courthouse.

(Eff. 11/24/14)

(4) PALO ALTO COURTHOUSE

All misdemeanor, felony, and Municipal Code matters designated in the Criminal Local Bail Schedule arising within Cupertino, Los Altos, Los Altos Hills, Mountain View, Sunnyvale and Palo Alto and adjacent unincorporated areas are filed in this courthouse.

(Eff. 11/24/14)

(5) SANTA CLARA COURTHOUSE

All traffic infractions and Municipal Code matters designated in the Traffic Local Bail Schedule arising in the County of Santa Clara are heard in this courthouse.

(Eff. 11/24/14)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

CRIMINAL RULES

RULE 2 CONTINUANCES

All requests to continue the trial of matters on the Master Trial Calendar shall only be heard by the Supervising Judge – Criminal on the After-Arraignment Calendar. Unless good cause is shown, requests to continue shall be heard on the After Arraignment Calendar before the matter's appearance on the Master Calendar. Unless good cause is shown, the deadline for placing Penal Code § 1050 requests on the After Arraignment calendar is noon on the Monday immediately preceding the calling of that After Arraignment Calendar. Requests for continuances in the trial department shall immediately be referred back to the department of the judge supervising the Master Trial Calendar.

(Eff. 1/01/11)

RULE 3 APPEARANCES

A. APPEARANCE OF COUNSEL

(1) Counsel must appear at all hearings, unless other counsels appear for them or prior arrangements are made with the Court.

(2) Counsel shall advise the Court of any conflicting appearance in the court of another county prior to requesting or agreeing to any hearing date. Furthermore, counsel shall not request or agree to any hearing date in another county that conflicts with a hearing date previously set by the Court.

(Eff. 7/26/00)

B. ATTORNEY OF RECORD

In compliance with California Penal Code § 987.1, all counsel who represented a defendant at the preliminary examination or at the time the defendant was otherwise held to answer shall appear and represent the defendant at the time of arraignment on the Information. Any request to be relieved as attorney of record should be made at this first appearance.

(Eff. 7/26/00)

C. APPEARANCE OF DEFENDANT

(1) Consistent with California Penal Code § 977, in felony cases, the defendant must be present each time his/her matter is called in Court, including when matters are submitted, unless a written waiver is on file. Absent a written waiver of appearance, failure of the defendant to appear will result in the issuance of a bench warrant. A written waiver of appearance shall not relieve a defendant from appearing at the Arraignment, Preliminary Examination, at the time of Plea, Master Trial Calendar (MTC), motions under Penal Code § 1050, and Sentencing.

(Eff. 1/01/11)

(2) In misdemeanor cases, defendants may appear in person or by counsel. However, a defendant must be present in Court if specifically ordered by the Court as allowed by Penal Code § 977 or required by statute. In misdemeanor domestic violence cases as defined by Penal Code § 977(a)(2), the defendant shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the Court for the purpose of being informed of the conditions of a protective order issued pursuant to § 136.2.

(Eff. 1/01/11)

D. REQUESTS FOR INTERPRETERS

Prosecution and defense requests for interpreters for trial, preliminary hearings, motions, or any other appearances, must be made in open court at the time these matters are set.

RULE 4 DOCUMENTS PRESENTED FOR FILING

A. SECURING OF DOCUMENTS

All papers and documents presented for filing shall have two standard pre-punched holes approximately 2 ¾" on center apart centered approximately 5/8" from the top of the paper or document.

B. THICKNESS OF DOCUMENTS

All papers and documents presented for filing shall not exceed 1 ½" in thickness, unless approved by the Judge in whose Court the matter is to be heard.

RULE 5 LAW AND MOTION

A. DEPARTMENTS

Law and Motion matters shall be heard as follows:

(1) MISDEMEANOR CASES

All motions shall be heard in the pretrial department to which that misdemeanor case is assigned.

(2) FELONY DRUG/NARCOTIC CASES (NON-THREE STRIKE CASES)

All motions shall be heard by the Judge specifically assigned to hear such motions.

(3) DOMESTIC VIOLENCE CASES

All motions shall be heard in the pretrial department to which that domestic violence case is assigned.

(4) OTHER MOTIONS

Motions in all other cases shall be heard by the Judge assigned to the Criminal Law and Motion department in the designated courthouse.

(Eff. 1/01/06)

B. FILING

Unless indicated otherwise, the following shall apply to ALL law and motion matters:

(1) COURT FILING

The party filing any motion paper must file the original in the Criminal Court Clerk's office in which the case is to be heard and on general jurisdiction matters provide a courtesy copy for the research attorney/law clerk of the Court assigned to hear the matter.

(Eff. 1/26/11)

(2) SERVICE OF COPIES

A copy of all moving and responding papers must be served upon opposing counsel, co-counsel and counsel for all co-defendants the same day that the originals are filed, unless previously served. Service upon the District Attorney and Public Defender can be accomplished by depositing the documents in those offices' mail boxes located in the Criminal Court Clerk's office at the Hall of Justice.

(3) LAST DAY TO FILE

The last day to file and hear motions shall be set or can be obtained at the time of arraignment in Superior Court, unless otherwise agreed to by the Court hearing the motion. (See also Criminal Rule 5(B) (4) below.)

(4) UNLESS OTHERWISE ORDERED BY THE COURT

a. All motions and applications, together with supporting papers, documents and Points and Authorities, must be filed with the Criminal Court clerk in the appropriate courthouse no later than 15 full calendar days prior to the date set for hearing. This requirement applies except where inconsistent with a state rule of court or statute. (See e.g. CCP § 1005 requiring 16 court days for a *Pitchess*/EC § 1043 motion.)

(Eff. 1/01/06)

b. Unless waived by the Court, or unless the party that would respond to the motion plans on conceding it, a written opposition, together with supporting papers, documents, and Points and Authorities must be filed.

c. All written responses, together with supporting papers, documents and Points and Authorities, must be filed with the Criminal Court clerk no later than five full Court days prior to the date set for hearing. The reply must be filed two Court days prior to the date set for the hearing.

(Eff. 1/01/11)

d. Failure of the moving or responding party to comply herewith shall be sufficient grounds for the Court to refuse to consider the matters contained in such moving or responding papers, as the case may be.

e. Except for limited jurisdiction matters, any motion to be filed containing a requested hearing date on or after the trial date must have the approval initials of the Supervising Judge – Criminal or his/her designee.

(Eff. 1/01/11)

(5) CONTINUANCES AND RE-SETTING, WITHDRAWAL OF TIME WAIVERS

a. Except in unusual or exigent circumstances, any party intending to request a continuance or not to proceed in any matter set for hearing shall promptly so inform all other counsel and THEN inform the Court assigned to hear the motion. This notification must be at least two court days preceding the hearing. It is counsel's responsibility in felony cases to place the case on the After-Arraignment Calendar if continuing the motion will require re-setting the trial date. Continuing the trial date will not be allowed in the Law and Motion department. (See 2, *supra.*)

(Eff. 1/01/11)

b. The Court shall have complete discretion concerning continuances, including the authority to deny any continuance and to rule in the absence of counsel, or to order the matter off calendar, notwithstanding any stipulation of counsel.

c. If a case has not been set for trial, withdrawal of a defendant's previously entered time waiver of speedy trial shall be by written Notice of Withdrawal of Time waiver filed in the department of the judge supervising the Master Trial Calendar. In the alternative, the withdrawal of time waiver may be made orally on the record by the defendant or his counsel in that department. If the case has been set for trial, the written Notice of Time waiver shall be filed or the oral withdrawal of time waiver shall be made, in the department where the cause is set for trial.

(Eff. 1/01/11)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

CRIMINAL RULES

(6) REQUESTS FOR ORDERS SHORTENING TIME

All requests for Orders Shortening Time shall be signed only by the Judge hearing the motion or his/her designee.

(7) NOTICE OF MOTION AND RESPONSE

a. Except for motions brought pursuant to California Penal Code § 995, if the motion is to be submitted in whole or in part on the transcript of the preliminary examination, or the transcript of any prior proceeding, the Notice of Motion and/or the Response must so state.

b. In any Motion brought pursuant to California Penal Code § 1538.5(i) that is to be presented *de novo*, notice of this fact must also be set out on the first page of the moving and responding papers.

(Eff. 1/01/11)

c. Failure to comply with any portion of this Criminal Rule 5(B) shall be sufficient cause for the Court to refuse to consider any transcript of a prior proceeding, allow the calling of additional witnesses or to allow a *de novo* hearing.

(8) MOTIONS TO SUPPRESS EVIDENCE

The notice of a motion brought pursuant to California Penal Code § 1538.5 shall describe and list the evidence which is the subject of the motion to suppress and shall be served with a Memorandum of Points and Authorities.

(Eff. 7/01/02)

(9) ORAL TESTIMONY

In all matters, oral testimony shall not be permitted unless the Court orders otherwise, except *de novo* hearings brought pursuant to California Penal Code § 1538.5. The Court shall have complete discretion as to the necessity for, nature and extent of oral argument. Notice of intent to call witnesses must be specifically set out on the first page of the moving and/or responding papers.

(10) EX PARTE MATTERS

Except as otherwise provided by law, for any application involving *ex parte* relief, reasonable advance notice must be given to opposing counsel, co-counsel and counsel for co-defendants. The presence of counsel or the applicant shall be required in any such matter.

(11) COMPLIANCE WITH RULES OF COURT

a. All papers filed in Law and Motion matters, and all proceedings thereunder, shall be in accordance with the applicable statutes, California Rules of Court and these Criminal Court Rules.

b. A mere citing of code sections which authorize the filing of a motion is not in compliance with the California Rules of Court or these Rules. Except as otherwise authorized by statute or Rule of Court, application for any relief, or any opposition to relief sought, shall be supported by a Memorandum of Points and Authorities.

c. All case citations must include the official report volume, page number, and year of decision.

(Eff. 7/01/08)

d. In any matter where a party is relying on out-of-state or federal authority, a copy of the entire authority must be provided.

e. Unless prior authorization is obtained from the Law and Motion Judge, all Memoranda of Points and Authorities shall be no longer than 15 pages.

(12) MEMORANDUM OF POINTS AND AUTHORITIES

A Memorandum of Points and Authorities shall contain a concise statement of facts, a concise statement of the law, evidence and arguments relied upon, a discussion of the statutes, cases and textbooks cited in support of the position advanced. When a party intends to rely on a transcript, the page number of the transcript must be cited.

(13) MOTION TO JOIN

Any party seeking to join in any motion shall set out the relevant facts and law as it relates to that joining party in particular.

(14) ESTIMATE OF TIME

All moving, responding and joining papers must set out an accurate time estimate on the first page. If the time estimate is in excess of two hours or cannot be heard on a regular Law and Motion calendar, the motion may be reset on the Master Trial Calendar.

(15) SEARCH WARRANTS

When a defendant is seeking to quash or traverse a search warrant, a copy of the search warrant affidavit must be provided and attached to the moving papers.

(16) MOTIONS FOR REINSTATEMENT

When moving to reinstate a complaint, the prosecuting attorney must provide a copy of the preliminary examination transcript.

(17) POST-TRIAL MOTIONS

a. Post-trial motions, motions for new trial and other matters related to contested cases shall be set and heard in the department where the Judge who heard the matter is currently sitting. The time and date of the hearing shall be set only by the Judge of such department.

b. In the event that the original trial Judge is retired or no longer available, matters in Criminal Rule 5(B) (17) (a) will be assigned out for hearing by the Supervising Judge – Criminal.

(18) SENTENCE MODIFICATION

Motions for modification of sentence shall be heard as set out in Criminal Rule 5 (B) (17) (a), *supra*. For all requests for modification of sentence, notice must be sent to the District Attorney's Office as well as the Adult Probation Department (in cases in which formal probation has been granted) before such request will be considered or calendared for hearing. Proof of such notice must be attached to the original request filed with the Court. Failure to do so will result in the request being treated as an improper *ex parte* communication with the Court and will be discarded.

(19) USE OF JUVENILE RECORDS

Attorneys or defendants who are involved in a criminal proceeding in the Superior Court of California, County of Santa Clara, and who seek juvenile records for use in the pending criminal action shall, in addition to filing a W&I Code § 827 Petition in the Juvenile Court, concurrently file a Declaration of Filing of Juvenile Court 827 Petition in the criminal case (Attachment CR-6082).

(Eff. 7/01/12)

RULE 6 PROPOSED ORDERS

Any proposed order submitted to the Court for signature must contain a footer with the title of the order on every page, including the signature page, unless it is a Judicial Council form. In addition, the Court signature and date lines must not be on a page by themselves; the signature page must contain some text of the order.

(Eff. 1/01/10)

RULE 7 WRITS

A. CRIMINAL COURT CLERK'S OFFICE FILING

Petitions for writs such as Writs of Habeas Corpus, Writs of Mandate or Writs of Coram Nobis in criminal cases shall be filed in the Criminal Division at the Hall of Justice.

(Eff. 7/01/11)

B. CIVIL COURT CLERK'S OFFICE FILING

(1) Petitions for Writs of Mandate and/or Prohibition shall be filed in the Civil Division of the Downtown Superior Courthouse located at 191 North First Street, San José, California.

(Eff.1/01/06)

(2) Petitions for Writs of Habeas Corpus Re: Quarantine Detention shall be filed in the Probate Division of the Downtown Superior Courthouse located at 191 North First Street, San José, California.

(Eff. 7/01/11)

RULE 8 SUBPOENAS DUCES TECUM

All subpoenas duces tecum in criminal cases must comply with Penal Code § 1326 and Evidence Code § 1560, and when applicable CCP § 1985.3, and shall be returnable to the court. In the event materials which are the subject of a subpoena are received by a party, an attorney, or an attorney's agent or investigator directly from the subpoenaed party, the person receiving such materials shall immediately lodge such materials with the clerk of the court. The materials shall not be opened, reviewed or copied by the recipient without a prior court order.

(Eff. 7/01/05)

RULE 9 REQUEST FOR COPY/TRANSCRIPT OF ELECTRONIC SOUND RECORDING FOR RECORD ON APPEAL, WRITS, OR OTHER HEARINGS FOR MISDEMEANORS OR INFRACTIONS

(1) The courthouse supervisor or his/her designee shall retain custody of the original sound recording, unless ordered to deliver it to the reviewing court. Tapes shall be under the control of the Court Services Manager.

(Eff. 1/01/08)

(2) The Court Services Manager or his/her designee shall make the original sound recording available to the parties and counsel for listening in courthouses during normal business hours within 72 hours of submission of a request to the Court Services Manager.

(Eff. 1/01/08)

(3) At the time of filing of a Notice of Appeal, Notice of Petition for Writ or Notice of Motion, or within 10 days of the filing of such notice, counsel for the appellant, petitioner or moving party (or by the party if unrepresented by counsel), shall advise the Court if there is a request for a copy of the recording or its transcript. Such request shall be made in writing to the clerk at the courthouse in which the appeal/petition/notice is filed.

(Eff. 1/01/08)

(4) Courthouse staff shall inform the requesting party of the current cost per recording and collect the fees at the time the request is submitted.

(Eff. 1/01/08)

(5) Within 48 hours of receipt of the request, the clerk of the courthouse shall forward the request to the Court Services Manager or his/her designee.

(Eff. 1/01/08)

(6) When a request is made for a copy of the recording of the proceedings, the following shall apply:

(Eff. 1/01/08)

a. Within 10 days of receipt of the request, the Court Services Manager or his/her designee shall prepare and label one copy of the original sound recording for each requesting party. The copies shall be playable at 1 7/8" per second.

(Eff. 1/01/08)

b. The Court Services Manager or his/her designee shall promptly contact the appropriate parties to arrange for them to pick up their copy of the recording.

(Eff. 1/01/08)

c. In all cases involving appeals, the applicable California Rules of Court shall then apply regarding the settlement of a statement of proceedings.

d. In cases involving appeals, counsel for the moving party shall serve opposing counsel or party, if unrepresented, with either a transcript or a copy of the recording requested within 10 days of receipt of the copy of the recording.

(Eff. 1/01/08)

(7) When a request is made for a transcript of the proceedings upon filing of Notice of Appeal (CR-142) the following shall apply:

a. Upon filing Notice of Appeal (Judicial Council form CR-142) the Traffic Appeals Clerk shall notify Court Services that appellant has selected paragraph 4(b) entitled "Transcript from Official Electronic Recording" in form CR-142.

b. Court Services shall determine length and cost of transcript from official recording.

c. Court Services shall notify appellant of the estimated costs for the transcript and all necessary copies (in the same manner as a court

reporter would and with the same time constraints as in the appeal process).

d. After receipt of appellant's payment at the facility of their appeal, the Traffic Appeals Clerk will notify Court Services to prepare transcript.

e. The Court Services Manager or his/her designee shall promptly send a copy of the original recording to the transcriptionist.

f. In appeal proceedings, the California Rules of Court shall apply.

(Eff. 1/01/11)

RULE 10 TRIAL JURORS

A. Release of Juror Information shall be allowed only as provided in CCP § 237.
(Eff. 7/01/02)

RULE 11 SPECIAL CONSIDERATION IN DOMESTIC VIOLENCE CASES
(Eff. 1/01/10)

A. CRIMINAL COURT PROCEDURE ON PROTECTIVE ORDERS-COURT COMMUNICATIONS

(Eff. 1/01/10)

(1) When the Criminal Court issues Criminal Protective Orders protecting victims, the Criminal Court shall inquire of the defendant/restrained person whether there are any children of the relationship between the defendant/restrained person and the victim/protected person, and whether there are any court orders for custody/visitation for those children. If there are children, the Criminal Court shall consider whether peaceful contact with the victim/protected person should be allowed for the purpose of allowing defendant/restrained person to visit the children. The Court shall give the defendant/restrained person the Restrained Person Packet concerning his or her rights to request custody and/or visitation through the Family or Juvenile Court, along with directions to the Self-Service Center. The Criminal Court shall also inquire of the defendant/restrained person whether there are any existing protective/restraining orders involving the defendant/restrained person, the victim/protected person, and/or the children. Subject to available resources, the Court shall examine available databases for existing protective or restraining orders before issuing permanent Criminal Protective Orders.

(2) When the Criminal Court issues Criminal Protective Orders which list the defendant/restrained person's minor children as protected persons, the Criminal Court shall fax a copy of its Order to the Supervising Judge of the Family Court, unless the Criminal Court is aware that a Juvenile or Probate Court proceeding concerning the family is pending, in which case a copy of the order shall be faxed to the applicable Juvenile or Probate Court.

B. MODIFICATION OF CRIMINAL PROTECTIVE ORDERS – COURT COMMUNICATIONS

(Eff. 1/01/10)

(1) Any Court responsible for issuing custody or visitation orders involving minor children of a defendant/restrained person subject to a Criminal Protective Order may modify the Criminal Protective Order if all of the following circumstances are satisfied:

(Eff. 1/01/06)

a. Both the defendant/restrained person and the victim/protected person are subject to the jurisdiction of the Family, Juvenile, or Probate Court, and both parties are present before the Court.

b. The defendant/restrained person is on probation (formal or court) for a domestic violence offense in Santa Clara County or is currently charged with a domestic violence related offense in Santa Clara County and a Criminal Protective Order has issued.

(Eff. 1/01/06)

c. The Family, Juvenile, or Probate Court identifies a Criminal Protective Order issued against the defendant, which is inconsistent with a proposed Family, Juvenile, or Probate Court Order, such that the Family, Juvenile, or Probate Order is/will be more restrictive than the Criminal Protective Order or there is a proposed custody or visitation order which requires recognition in the Criminal Protective Order (Boxes 13 or 14 or both on the Criminal Protective Order form).

(Eff. 1/01/07)

d. The defendant signs an appropriate waiver of rights form or enters a waiver of rights on the record.

e. Both the victim/protected person and the defendant/restrained person agree that the Criminal Protective Order may be modified to a more restrictive order or to add Box 13 or 14 or both to the Criminal Protective Order.

(Eff. 1/01/07)

(2) The Family, Juvenile, or Probate Court may not modify existing Criminal Protective Orders to be less restrictive. Only if children are not listed as protected persons, a modification of the Criminal Protective Order to check Box 13 or 14 or both shall not be considered less restrictive.

(Eff. 1/01/07)

(3) The Family, Juvenile, or Probate Court may on its own motion or at the request of a defendant, protected person or other interested party, calendar a hearing before the Criminal Court on the issue of whether a Criminal Protective Order should be modified. The Family, Juvenile, or Probate Court shall provide the Criminal Court with copies of existing or proposed Orders relating to the matter. Notice of the hearing will be provided to all counsel and parties.

(Eff. 1/01/07)

C. CONSIDERATIONS FOR CHILDREN EXPOSED TO DOMESTIC VIOLENCE

(1) In addition to determining the names and birthdays of any children, the Court will make a determination from competent evidence whether any child was exposed to domestic violence. If any child has been exposed to domestic violence, the Court will distribute to a responsible adult a packet of information entitled "Therapeutic Services for Children Exposed to Domestic Violence," and will assist in making outside services available as early as possible in the criminal proceedings.

(2) Where appropriate, the Court will order restitution to pay for the services, and utilize any other service available to the Court to carry out the Court's intention to connect children with such services.

(Eff. 1/01/10)

D. PROPERTY REMOVAL ORDERS

In cases where the Court allows the Restrained Person to remove his/her "necessary personal property" from the Protected Person's residence as a one time exception to the Protective Order, Attachment CR-6072 (Property Removal Orders) shall be completed by and filed by the Court and each party shall be provided with one certified copy of the same.

(Eff. 1/01/11)

RULE 12 TRAFFIC DIVISION – TRIAL BY DECLARATION

The Court adopts the trial by declaration process defined in Vehicle Code § 40902. Additionally, pursuant to Vehicle Code § 40903, any person who fails to appear as provided by law may be deemed to have elected to have a trial by written declaration upon any alleged infraction, as charged by the citing officer, involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the code. In eligible cases the Court will conduct the trial in absentia and it will be adjudicated on the basis of the notice to appear issued pursuant to Vehicle Code § 40500 and any business record or receipt, sworn declaration of the arresting officer, or written statement or letter signed by the defendant that is in the file at the time the trial by declaration is conducted.

If there is a guilty finding, the conviction shall be reported to the DMV and the defendant notified of the disposition of the case, the amount of imposed fines and fees, and the defendant's right to request a trial de novo within a specified period of time. If there is no timely request for a trial de novo and the fines and fees are not paid by the due date, the case will proceed to civil assessment pursuant to Penal Code § 1214.1. Additionally, the DMV will be notified of the failure to pay pursuant to Vehicle Code § 40509.5(b), which can result in a suspension of the defendant's driver's license pursuant to Vehicle Code § 13365(a) (2) until all obligations to the Court are satisfied.

(Eff. 1/01/08)

RULE 13 ANCILLARY DEFENSE EXPENSES

A. SCOPE

This rule states the requirements for the payment under Penal Code § 987.2 of the necessary expenses that are incurred by appointed or retained counsel, or self-represented defendants, for the defense of persons who are not able to pay for the costs themselves. This rule will refer to these necessary expenses as "ancillary defense expenses." All funds expended under Penal Code § 987.2 for ancillary defense expenses must have prior approval by Court order. Funds approved for a specific purpose, moreover, may not be expended for another use without prior Court approval.

B. REQUIRED SUBMISSIONS

All initial applications for the authorization of ancillary defense expenses shall be submitted by ex parte motion to the clerk of the Criminal Division Supervising Judge. The application shall be accompanied by: (1) a declaration of defendant's indigence, signed under penalty of perjury; and (2) a declaration with the information described in subdivision C below.

C. REQUIRED DECLARATION

All applications for ancillary defense expenses shall be supported by a declaration setting forth:

(1) a summary of the circumstances of the charged offense or facts that demonstrates why the funding of ancillary defense expenses is necessary in the interests of justice;

(2) the status of the case;

(3) the specific purpose for the funds, including the nature of the services to be rendered and an explanation why those services are reasonably necessary for the defense of the case; and

(4) the name and title of each appointed service provider (investigator, expert, or other) for whom funds are being sought, the hourly rate and maximum amount expected to be charged for the service, travel-related expenses other than mileage, and any other special expenses. If a self-represented defendant has not suggested a particular investigator, the Court will select one from the rotational investigator list. Billing rates for all investigators shall be no more than $60.00 per hour, and the initial authorization for

investigators shall be limited to $1,500.00 (including hourly fees and any mileage at prevailing rates as set by the Court). Billing rates for legal runners shall be no more than $15.00 per hour, and the initial authorization for legal runners shall be limited to $250.00. Legal runner services, when approved by the Court, are limited to photocopying, and transporting materials, orders, and motions. Visits and phone calls to the County's detention centers must be associated with an allowable billable activity, and will be subject to the Court's discretion.

D. TRAVEL EXPENSES

(1) No funds may be expended for overnight travel by investigators, experts, or others without prior Court approval. Pre-approved hourly investigation expenses may not be applied to overnight or airline travel costs unless expressly designated by the Court for travel after an appropriate request.

(2) Applications that include a request for travel expenses to interview witnesses must contain, in addition to the requirements above, a declaration setting forth:

(a) the relevance and materiality of the witness's proposed testimony;

(b) an explanation why a telephone interview or an interview conducted through the Internet or other forms of electronic communication would not suffice instead of a face-to-face interview;

(c) an explanation why it would not be practical to utilize the services of an investigator in the area where the witness lives to conduct the interview; and

(d) whether it would be feasible to fly the witness to the San Jose airport for an interview, with a return flight the same day, to avoid the expense of overnight travel for the investigator.

(e) The applicant should endeavor to secure the lowest possible airfare.

E. EXPENSES FOR MEDICAL AND MENTAL HEALTH PROFESSIONALS

On initial applications for authorizing expenses for doctors, psychologists, psychiatrists, and similar experts, the maximum amount allowed by the Court will be an amount sufficient to procure an initial written report from the expert. This report should describe the need, if any, for further services at an approved rate. The defense must endeavor to negotiate the lowest hourly rate. If the defense retains an expert from outside the Bay Area, the declaration shall explain in detail why local experts could not be employed to provide similar services. Expenses

for supplemental reports by experts or investigators may not be paid by the Court without prior Court approval.

F. ADDITIONAL FUNDING.

After the initial funding approved by the declaration described in subsection C above has been exhausted, no additional work may be performed or compensated without first obtaining Court approval by submitting a supplemental funding request under this subsection. Each application for additional funding for a previously authorized service provider (investigator, expert, or other) shall state, in the heading of the pleading, that it is a supplemental request, and shall include a declaration setting forth:

(1) the date and amount of previous funding authorizations for the service provider;
(2) the amount of any billings for services completed by the service provider;
(3) the remaining balance from funds previously authorized for the service provider; and
(4) a detailed description of the services remaining to be performed. Any additional request for the services of an expert must be accompanied by a report or declaration of the expert explaining the need for the additional services.

G. CLAIMS FOR THE PAYMENT OF ANCILLARY DEFENSE EXPENSES

Claims for the payment of ancillary defense expenses must have prior Court authorization as described above; without prior authorization, claims will not be paid. Claims for payment of ancillary defense expenses shall be submitted to the Court within 60 days of the completion of the approved services. Claims must specify the services performed, with dates and hours of service itemized. When travel or mileage is claimed, the locations must be specified. Claims shall be accompanied by all supporting documentation, including original invoices or receipts, and authorizing Court orders.

(Eff. 7/1/13)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

CRIMINAL RULES

RULE 14 PROTOCOL FOR SEALING OF RECORDS-CRIMINAL DIVISION

In proceedings for requests for the sealing of Court records in the Criminal Division, California Rules of Court, Rules 2.550 and 2.551 et seq. shall apply. All judicial officers have the responsibility and authority to decide sealing requests. The Supervising Judge of the Criminal Division may designate the judges in each Criminal Courthouse to hear sealing requests in accordance with this protocol.

A. COURT RECORDS PRESUMED TO BE OPEN

Unless confidentiality is required by law, Court records are presumed to be open. (California Rules of Court, Rule 2.550(c).)

B. DEFINITIONS

(1) "Record" means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court. (California Rules of Court, Rule 2.550(b)(1).)

(2) A "sealed" record is a record that, by Court order, is not open to inspection by the public. (California Rule of Court 2.550(b)(2))

C. SCOPE OF PROTOCOL

(1) These rules do not apply to records that are required to be kept confidential by law, (e.g., search warrant records which are sealed pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948, 963. (California Rules of Court, Rule 2.550(a)(2).)

(2) No action taken under this protocol, including the sealing of any records, shall affect the criminal discovery process, including any protective orders or actions pursuant to Penal Code § 1054.7.

D. EXPRESS FACTUAL FINDINGS REQUIRED TO SEAL RECORDS

Pursuant to California Rules of Court, Rule 2.550(d), the Court may order that a record be filed under seal only if it expressly finds facts that establish:

(1) There exists an overriding interest that overcomes the right of public access to the records;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

E. APPLICATION, FILING AND SERVICE REQUIREMENTS

(1) A party seeking an order to seal a record shall comply with the requirements of California Rules of Court, Rule 2.551.

(2) Except as provided in E(3), any motion or application to seal a record shall be filed with the Court at least four Court days prior to the time set for the hearing of the motion or application. Records that are the subject of a motion or application to seal shall be provisionally sealed pending the determination of the motion to seal. Such records may be considered by the Court for any purpose, including a finding of probable cause, pending the determination of the motion or application to seal. The Clerk's Office shall post the motion or application and any attachments (except for attachments containing information sought to be sealed), case name and docket number on the Court website no later than 5 p.m. of the second Court day after filing.

(3) If a sealing order is issued pursuant to an ex parte application, the Clerk's Office shall post the motion or application and any attachments (except for attachments containing information sought to be sealed), case name and docket number on the Court website no later than 5 p.m. of the second Court day after filing. If the Court issues a sealing order following an *ex parte* application, that order shall be deemed to be a provisional order and subject to a *de novo* court review upon the request of any interested person.

F. NOTICE OF SEALING ORDER

In every matter in which a record has been ordered sealed, the requesting party shall file in the Clerk's Office a written notice of the sealing order prior to the date of arraignment, or if arraignment has already taken place, no later than 5 p.m. of the second Court day after the sealing order.

G. UNSEALING OF RECORDS

(1) In misdemeanor matters, if any record has been ordered sealed, the Court shall order that the record be unsealed at the time of arraignment unless a party to the proceedings requests that the record remain sealed and the Court makes express findings pursuant to Section D above to permit the continued sealing of the record. Notice of any request that the record remain sealed shall be provided in accordance with Section E. If notice is provided in accordance with Section E, a motion or application to seal may be heard at the Court's next motion calendar.

(2) In felony matters, if any record has been ordered sealed, the Court shall order that the record be unsealed no later than the completion of the preliminary examination unless a party to the proceedings requests that the record remain sealed and the Court makes express findings pursuant to Section D above. Notice of any request that record remain sealed shall be provided in accordance with section E and shall be filed and served on all parties who have appeared in the proceedings at least three Court days prior to the first date scheduled for the preliminary examination. The hearing on the request for the record to remain sealed will be heard at the conclusion of the preliminary examination.

(3) In all matters, any person may bring a motion or application pursuant to California Rules of Court, Rule 2.551(h) for the unsealing of any Court record previously sealed, and the Court may order the unsealing of any record previously sealed in accordance with that rule.

(Eff. 1/01/15)

PROOF OF SERVICE BY U.S. MAIL, ELECTRONIC MAIL, AND ONLINE SUBMISSION

I, Jonathan E. Berger, declare:

I am over 18 years of age and not a party to this action. I am a citizen of the United States and a resident of Sonoma County, California. My business address is 1415 Fulton Road #205-170, Santa Rosa, California.

On June 11, 2015, I served the attached:

MOTION FOR JUDICIAL NOTICE

by placing true and correct copies thereof in sealed envelopes, with first class postage fully prepaid thereon, and placing them in a United States Postal Service mailbox. The envelopes were addressed as follows:

Appeals Clerk, Criminal Division
Santa Clara County Superior Court
191 N. First Street
San José, CA 95113-1090
Attn: Hon. Jerome Nadler

Office of the District Attorney
70 W. Hedding Street
San José, CA 95110

Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050

On the same date, I served the same document by transmitting true and correct electronic copies thereof, in PDF format, by electronic mail to the following addresses. The originating email address was jonbergerlaw@gmail.com.

Office of the Attorney General
Docketing6DCASFAWT@doj.ca.gov

Nafiz M. Ahmed, Esq.
nafiz@ahmedandsukaram.com

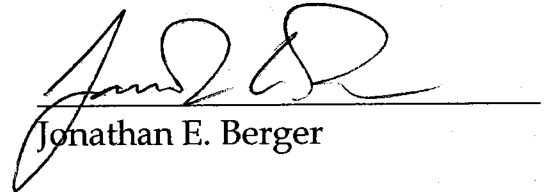
Victoria Hobel Schultz, Esq.
vhobelschultz@gmail.com

Adam S. Rodriguez
[Email address on file]

On the same date, I served the same document to the Court of Appeal, Sixth Appellate District, by transmitting a true and correct electronic copy thereof, in PDF format, by means of that court's online electronic submission facility.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 10, 2015
Sebastopol, CA



Jonathan E. Berger