

AMENDED IN SENATE APRIL 25, 2013

**SENATE BILL**

**No. 717**

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**Introduced by ~~Senator~~ *Senators DeSaulnier and Correa***

February 22, 2013

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An act to amend Section ~~782 of the Evidence Code~~ *1524 of the Penal Code*, relating to ~~evidence search warrants~~, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 717, as amended, DeSaulnier. ~~Credibility of witnesses: sexual conduct evidence. Search warrants: driving under the influence.~~

*Existing law provides that a search warrant may only be issued upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. Existing law also states the grounds upon which a search warrant may be issued, including, among other grounds, when the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony, or when there is a warrant to arrest a person.*

*This bill would additionally authorize the issuance of a search warrant to authorize a blood draw from a person in a medically approved manner when there is probable cause to believe the person has violated specified provisions related to driving under the influence, and the person has refused an officer's request to submit to, or has failed to complete, a chemical test or tests, as specified.*

*This bill would declare that it is to take effect immediately as an urgency statute.*

~~Existing law sets forth the procedure required in any prosecution for rape or other specified offenses, with certain exceptions, if evidence of sexual conduct of the complaining witness, as defined, is offered to attack the credibility of the complaining witness.~~

~~This bill would expand the offenses included within the term “sexual conduct” to include commercial sexual conduct, as specified, and would make conforming changes to those provisions.~~

Vote: ~~majority~~<sup>2/3</sup>. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

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

1     SECTION 1. Section 1524 of the Penal Code is amended to  
2     read:  
3     1524. (a) A search warrant may be issued upon any of the  
4     following grounds:  
5         (1) When the property was stolen or embezzled.  
6         (2) When the property or things were used as the means of  
7     committing a felony.  
8         (3) When the property or things are in the possession of any  
9     person with the intent to use them as a means of committing a  
10    public offense, or in the possession of another to whom he or she  
11    may have delivered them for the purpose of concealing them or  
12    preventing them from being discovered.  
13         (4) When the property or things to be seized consist of any item  
14    or constitute any evidence that tends to show a felony has been  
15    committed, or tends to show that a particular person has committed  
16    a felony.  
17         (5) When the property or things to be seized consist of evidence  
18    that tends to show that sexual exploitation of a child, in violation  
19    of Section 311.3, or possession of matter depicting sexual conduct  
20    of a person under ~~the age of~~ 18 years *of age*, in violation of Section  
21    311.11, has occurred or is occurring.  
22         (6) When there is a warrant to arrest a person.  
23         (7) When a provider of electronic communication service or  
24    remote computing service has records or evidence, as specified in  
25    Section 1524.3, showing that property was stolen or embezzled  
26    constituting a misdemeanor, or that property or things are in the  
27    possession of any person with the intent to use them as a means  
28    of committing a misdemeanor public offense, or in the possession

1 of another to whom he or she may have delivered them for the  
2 purpose of concealing them or preventing their discovery.

3 (8) When the property or things to be seized include an item or  
4 any evidence that tends to show a violation of Section 3700.5 of  
5 the Labor Code, or tends to show that a particular person has  
6 violated Section 3700.5 of the Labor Code.

7 (9) When the property or things to be seized include a firearm  
8 or any other deadly weapon at the scene of, or at the premises  
9 occupied or under the control of the person arrested in connection  
10 with, a domestic violence incident involving a threat to human life  
11 or a physical assault as provided in Section 18250. This section  
12 does not affect warrantless seizures otherwise authorized by Section  
13 18250.

14 (10) When the property or things to be seized include a firearm  
15 or any other deadly weapon that is owned by, or in the possession  
16 of, or in the custody or control of, a person described in subdivision  
17 (a) of Section 8102 of the Welfare and Institutions Code.

18 (11) When the property or things to be seized include a firearm  
19 that is owned by, or in the possession of, or in the custody or  
20 control of, a person who is subject to the prohibitions regarding  
21 firearms pursuant to Section 6389 of the Family Code, if a  
22 prohibited firearm is possessed, owned, in the custody of, or  
23 controlled by a person against whom a protective order has been  
24 issued pursuant to Section 6218 of the Family Code, the person  
25 has been lawfully served with that order, and the person has failed  
26 to relinquish the firearm as required by law.

27 (12) When the information to be received from the use of a  
28 tracking device constitutes evidence that tends to show that either  
29 a felony, a misdemeanor violation of the Fish and Game Code, or  
30 a misdemeanor violation of the Public Resources Code has been  
31 committed or is being committed, tends to show that a particular  
32 person has committed a felony, a misdemeanor violation of the  
33 Fish and Game Code, or a misdemeanor violation of the Public  
34 Resources Code, or is committing a felony, a misdemeanor  
35 violation of the Fish and Game Code, or a misdemeanor violation  
36 of the Public Resources Code, or will assist in locating an  
37 individual who has committed or is committing a felony, a  
38 misdemeanor violation of the Fish and Game Code, or a  
39 misdemeanor violation of the Public Resources Code. A tracking  
40 device search warrant issued pursuant to this paragraph shall be

1 executed in a manner meeting the requirements specified in  
2 subdivision (b) of Section 1534.

3 *(13) When there is probable cause to believe a person has*  
4 *violated Section 23140, 23152, or 23153 of the Vehicle Code and*  
5 *the person has refused an officer's request to submit to, or has*  
6 *failed to complete, a chemical test or tests pursuant to Section*  
7 *23612 of the Vehicle Code, to authorize a blood draw from the*  
8 *person in a medically approved manner.*

9 (b) The property, things, person, or persons described in  
10 subdivision (a) may be taken on the warrant from any place, or  
11 from any person in whose possession the property or things may  
12 be.

13 (c) Notwithstanding subdivision (a) or (b), no search warrant  
14 shall issue for any documentary evidence in the possession or  
15 under the control of any person who is a lawyer as defined in  
16 Section 950 of the Evidence Code, a physician as defined in Section  
17 990 of the Evidence Code, a psychotherapist as defined in Section  
18 1010 of the Evidence Code, or a member of the clergy as defined  
19 in Section 1030 of the Evidence Code, and who is not reasonably  
20 suspected of engaging or having engaged in criminal activity  
21 related to the documentary evidence for which a warrant is  
22 requested unless the following procedure has been complied with:

23 (1) At the time of the issuance of the warrant, the court shall  
24 appoint a special master in accordance with subdivision (d) to  
25 accompany the person who will serve the warrant. Upon service  
26 of the warrant, the special master shall inform the party served of  
27 the specific items being sought and that the party shall have the  
28 opportunity to provide the items requested. If the party, in the  
29 judgment of the special master, fails to provide the items requested,  
30 the special master shall conduct a search for the items in the areas  
31 indicated in the search warrant.

32 (2) (A) If the party who has been served states that an item or  
33 items should not be disclosed, they shall be sealed by the special  
34 master and taken to court for a hearing.

35 (B) At the hearing, the party searched shall be entitled to raise  
36 any issues that may be raised pursuant to Section 1538.5 as well  
37 as a claim that the item or items are privileged, as provided by  
38 law. The hearing shall be held in the superior court. The court shall  
39 provide sufficient time for the parties to obtain counsel and make  
40 any motions or present any evidence. The hearing shall be held

1 within three days of the service of the warrant unless the court  
2 makes a finding that the expedited hearing is impracticable. In that  
3 case the matter shall be heard at the earliest possible time.

4 (C) If an item or items are taken to court for a hearing, any  
5 limitations of time prescribed in Chapter 2 (commencing with  
6 Section 799) of Title 3 of Part 2 shall be tolled from the time of  
7 the seizure until the final conclusion of the hearing, including any  
8 associated writ or appellate proceedings.

9 (3) The warrant shall, whenever practicable, be served during  
10 normal business hours. In addition, the warrant shall be served  
11 upon a party who appears to have possession or control of the  
12 items sought. If, after reasonable efforts, the party serving the  
13 warrant is unable to locate the person, the special master shall seal  
14 and return to the court, for determination by the court, any item  
15 that appears to be privileged as provided by law.

16 (d) (1) As used in this section, a “special master” is an attorney  
17 who is a member in good standing of the California State Bar and  
18 who has been selected from a list of qualified attorneys that is  
19 maintained by the State Bar particularly for the purposes of  
20 conducting the searches described in this section. These attorneys  
21 shall serve without compensation. A special master shall be  
22 considered a public employee, and the governmental entity that  
23 caused the search warrant to be issued shall be considered the  
24 employer of the special master and the applicable public entity,  
25 for purposes of Division 3.6 (commencing with Section 810) of  
26 Title 1 of the Government Code, relating to claims and actions  
27 against public entities and public employees. In selecting the  
28 special master, the court shall make every reasonable effort to  
29 ensure that the person selected has no relationship with any of the  
30 parties involved in the pending matter. Any information obtained  
31 by the special master shall be confidential and may not be divulged  
32 except in direct response to inquiry by the court.

33 (2) In any case in which the magistrate determines that, after  
34 reasonable efforts have been made to obtain a special master, a  
35 special master is not available and would not be available within  
36 a reasonable period of time, the magistrate may direct the party  
37 seeking the order to conduct the search in the manner described  
38 in this section in lieu of the special master.

39 (e) Any search conducted pursuant to this section by a special  
40 master may be conducted in a manner that permits the party serving

1 the warrant or his or her designee to accompany the special master  
2 as he or she conducts his or her search. However, that party or his  
3 or her designee may not participate in the search nor shall he or  
4 she examine any of the items being searched by the special master  
5 except upon agreement of the party upon whom the warrant has  
6 been served.

7 (f) As used in this section, “documentary evidence” includes,  
8 but is not limited to, writings, documents, blueprints, drawings,  
9 photographs, computer printouts, microfilms, X-rays, files,  
10 diagrams, ledgers, books, tapes, audio and video recordings, films,  
11 and papers of any type or description.

12 (g) No warrant shall issue for any item or items described in  
13 Section 1070 of the Evidence Code.

14 (h) Notwithstanding any other law, no claim of attorney work  
15 product as described in Chapter 4 (commencing with Section  
16 2018.010) of Title 4 of Part 4 of the Code of Civil Procedure shall  
17 be sustained where there is probable cause to believe that the  
18 lawyer is engaging or has engaged in criminal activity related to  
19 the documentary evidence for which a warrant is requested unless  
20 it is established at the hearing with respect to the documentary  
21 evidence seized under the warrant that the services of the lawyer  
22 were not sought or obtained to enable or aid anyone to commit or  
23 plan to commit a crime or a fraud.

24 (i) Nothing in this section is intended to limit an attorney’s  
25 ability to request an in camera hearing pursuant to the holding of  
26 the Supreme Court of California in *People v. Superior Court (Laff)*  
27 (2001) 25 Cal.4th 703.

28 (j) In addition to any other circumstance permitting a magistrate  
29 to issue a warrant for a person or property in another county, when  
30 the property or things to be seized consist of any item or constitute  
31 any evidence that tends to show a violation of Section 530.5, the  
32 magistrate may issue a warrant to search a person or property  
33 located in another county if the person whose identifying  
34 information was taken or used resides in the same county as the  
35 issuing court.

36 (k) This section shall not be construed to create a cause of action  
37 against any foreign or California corporation, its officers,  
38 employees, agents, or other specified persons for providing location  
39 information.

1     *SEC. 2. This act is an urgency statute necessary for the*  
2 *immediate preservation of the public peace, health, or safety within*  
3 *the meaning of Article IV of the Constitution and shall go into*  
4 *immediate effect. The facts constituting the necessity are:*

5     *In order to ensure the public is protected from persons driving*  
6 *under the influence at the earliest possible time, it is necessary*  
7 *that this act take effect immediately.*

8     SECTION 1. Section 782 of the Evidence Code is amended to  
9 read:

10     ~~782. (a) In any of the circumstances described in subdivision~~  
11 ~~(c), if evidence of sexual conduct of the complaining witness is~~  
12 ~~offered to attack the credibility of the complaining witness under~~  
13 ~~Section 780, the following procedure shall be followed:~~

14     ~~(1) A written motion shall be made by the party seeking to~~  
15 ~~introduce the evidence to the court, with notice to all parties, stating~~  
16 ~~that the party has an offer of proof of the relevancy of the evidence~~  
17 ~~proposed to be presented in attacking the credibility of the~~  
18 ~~complaining witness.~~

19     ~~(2) The written motion shall be accompanied by an affidavit in~~  
20 ~~which the offer of proof shall be stated. The affidavit shall be filed~~  
21 ~~under seal and only unsealed by the court to determine if the offer~~  
22 ~~of proof is sufficient to order a hearing pursuant to paragraph (3).~~  
23 ~~After that determination, the affidavit shall be resealed by the~~  
24 ~~court.~~

25     ~~(3) If the court finds that the offer of proof is sufficient, the~~  
26 ~~court shall order a hearing out of the presence of the jury, if any,~~  
27 ~~and at the hearing allow the questioning of the complaining witness~~  
28 ~~regarding the offer of proof.~~

29     ~~(4) At the conclusion of the hearing, if the court finds that the~~  
30 ~~evidence proposed to be offered of sexual conduct of the~~  
31 ~~complaining witness is relevant pursuant to Section 780, and is~~  
32 ~~not inadmissible pursuant to Section 352, the court may make an~~  
33 ~~order stating what part of the evidence may be introduced by the~~  
34 ~~proffering party, and the nature of the questions to be permitted.~~  
35 ~~The proffering party may then offer evidence pursuant to the order~~  
36 ~~of the court.~~

37     ~~(5) An affidavit resealed by the court pursuant to paragraph (2)~~  
38 ~~shall remain sealed, unless the proffering party raises an issue on~~  
39 ~~appeal or collateral review relating to the offer of proof contained~~  
40 ~~in the sealed document. If the proffering party raises that issue on~~

1 appeal, the court shall allow the Attorney General and appellate  
2 counsel for the defendant access to the sealed affidavit. If the issue  
3 is raised on collateral review, the court shall allow the district  
4 attorney and defendant's counsel access to the sealed affidavit.  
5 The use of the information contained in the affidavit shall be  
6 limited solely to the pending proceeding.

7 (b) As used in this section:

8 (1) "Complaining witness" means either of the following:

9 (A) The alleged victim of the crime charged, the prosecution  
10 of which is subject to this section, pursuant to paragraph (1) of  
11 subdivision (c):

12 (B) An alleged victim offering testimony pursuant to paragraph  
13 (2) or (3) of subdivision (c):

14 (2) "Sexual conduct" includes commercial sexual conduct,  
15 including, but not limited to, that described in subdivisions (b) and  
16 (e) of Section 236.1, 266, 266h, 266i, 266j, 267, 311.1, 311.2,  
17 311.3, 311.4, 311.5, 311.6, 518, or 647 of the Penal Code.

18 (c) The procedure provided by subdivision (a) shall apply in  
19 any of the following circumstances:

20 (1) In a prosecution under Section 236.1, 261, 262, 264.1, 266,  
21 266h, 266i, 266j, 267, 286, 288, 288a, 288.5, 289, 311.1, 311.2,  
22 311.3, 311.4, 311.5, 311.6, 518, or 647 of the Penal Code, or for  
23 assault with intent to commit, attempt to commit, or conspiracy  
24 to commit any crime defined in any of those sections, except if  
25 the crime is alleged to have occurred in a local detention facility,  
26 as defined in Section 6031.4 of the Penal Code, or in the state  
27 prison, as defined in Section 4504 of the Penal Code:

28 (2) When an alleged victim testifies pursuant to subdivision (b)  
29 of Section 1101 as a victim of a crime listed in Section 236.1,  
30 243.4, 261, 261.5, 266, 266h, 266i, 266j, 267, 269, 285, 286, 288,  
31 288a, 288.5, 289, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, 314,  
32 518, 647, or 647.6 of the Penal Code, except if the crime is alleged  
33 to have occurred in a local detention facility, as defined in Section  
34 6031.4 of the Penal Code, or in the state prison, as defined in  
35 Section 4504 of the Penal Code:

36 (3) When an alleged victim of a sexual offense testifies pursuant  
37 to Section 1108, except if the crime is alleged to have occurred in  
38 a local detention facility, as defined in Section 6031.4 of the Penal  
39 Code, or in the state prison, as defined in Section 4504 of the Penal  
40 Code:



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