

FILED
BY 5/5/03
C. Calhoun
CLERK
DEPUTY

1 JAMES C. BRAZELTON
District Attorney
2 Stanislaus County
Courthouse
3 Modesto, California
Telephone: 525-5550
4 Attorney for Petitioner
5

6 SUPERIOR COURT, STATE OF CALIFORNIA
7 COUNTY OF STANISLAUS
8

9 D.A. Number 1056770

10 THE PEOPLE OF THE STATE OF CALIFORNIA) No. 1056770

11 Petitioner,

12 vs.

POINTS AND AUTHORITIES
REGARDING ISSUE OF
CODE OF CIVIL PROCEDURE
SECTION 170.6

14 SCOTT LEE PETERSON,

15 Defendant.
16

17 Facts

18 On March 3, 2003 the Modesto Bee filed a Petition
19 in the Superior court seeking access to the search
20 warrants in the "Laci Peterson Investigation." The case
21 was captioned "In re 8 sealed search warrants - Laci
22 Peterson investigation" and was assigned case number
23 1045098 by the court. The case was assigned to the
24 Honorable Judge A. Girolami for hearing. The Modesto
25 Bee also filed a companion Petition to unseal search
26 warrants in the "Carmen Sabatino investigation" under
27 case number 1045110, which was also assigned to the
28 same court. Judge Girolami recused himself from the

1 Sabatino case (number 1045110) but not the "Peterson
2 investigation" matter. The People filed a C.C.P. §170.6
3 in case number 1045098.

4 Issue

5 Does the People's §170.6 challenge in case number
6 1045098 apply to this criminal case?

7 Law

8 Code of Civil Procedure section 170.6 states in
9 part:

10 "(1) No judge, court commissioner, or referee
11 of any superior court of the State of
12 California shall try any civil or criminal
13 action or special proceeding of any kind or
14 character nor hear any matter therein that
15 involves a contested issue of law or fact when
16 it shall be established as hereinafter provided
17 that the judge or court commissioner is
18 prejudiced against any party or attorney or the
19 interest of any party or attorney appearing in
20 the action or proceeding.

21 (2) Any party to or any attorney appearing in
22 any such action or proceeding may establish
23 this prejudice by an oral or written motion
24 without notice supported by affidavit or
25 declaration under penalty of perjury or an oral
26 statement under oath that the judge, court
27 commissioner, or referee before whom the action
28 or proceeding is pending or to whom it is
assigned is prejudiced against any such party
or attorney or the interest of the party or
attorney so that the party or attorney cannot
or believes that he or she cannot have a fair
and impartial trial or hearing before the
judge, court commissioner, or referee. Where
the judge, other than a judge assigned to the
case for all purposes, court commissioner, or
referee assigned to or who is scheduled to try
the cause or hear the matter is known at least
10 days before the date set for trial or
hearing, the motion shall be made at least five
days before that date. If directed to the trial
of a cause where there is a master calendar,
the motion shall be made to the judge
supervising the master calendar not later than

1 the time the cause is assigned for trial. If
2 directed to the trial of a cause that has been
3 assigned to a judge for all purposes, the
4 motion shall be made to the assigned judge or
5 to the presiding judge by a party within 10
6 days after notice of the all purpose
7 assignment, or if the party has not yet
8 appeared in the action, then within 10 days
9 after the appearance. If the court in which the
10 action is pending is authorized to have no more
11 than one judge and the motion claims that the
12 duly elected or appointed judge of that court
13 is prejudiced, the motion shall be made before
14 the expiration of 30 days from the date of the
15 first appearance in the action of the party who
16 is making the motion or whose attorney is
17 making the motion. In no event shall any judge,
18 court commissioner, or referee entertain the
19 motion if it be made after the drawing of the
20 name of the first juror, or if there be no
21 jury, after the making of an opening statement
22 by counsel for plaintiff, or if there is no
23 such statement, then after swearing in the
24 first witness or the giving of any evidence or
25 after trial of the cause has otherwise
26 commenced. If the motion is directed to a
27 hearing (other than the trial of a cause), the
28 motion shall be made not later than the
commencement of the hearing. In the case of
trials or hearings not herein specifically
provided for, the procedure herein specified
shall be followed as nearly as may be. The fact
that a judge, court commissioner, or referee
has presided at or acted in connection with a
pretrial conference or other hearing,
proceeding or motion prior to trial and not
involving a determination of contested fact
issues relating to the merits shall not
preclude the later making of the motion
provided for herein at the time and in the
manner hereinbefore provided.

A motion under this paragraph may be made
following reversal on appeal of a trial court's
decision, or following reversal on appeal of a
trial court's final judgment, if the trial
judge in the prior proceeding is assigned to
conduct a new trial on the matter.
Notwithstanding paragraph (3) of this section,
the party who filed the appeal that resulted in
the reversal of a final judgment of a trial
court may make a motion under this section
regardless of whether that party or side has
previously done so. The motion shall be made

1 within 60 days after the party or the party's
2 attorney has been notified of the assignment.
3 (3) If the motion is duly presented and the
4 affidavit or declaration under penalty of
5 perjury is duly filed or such oral statement
6 under oath is duly made, thereupon and without
7 any further act or proof, the judge supervising
8 the master calendar, if any, shall assign some
9 other judge, court commissioner, or referee to
10 try the cause or hear the matter. In other
11 cases, the trial of the cause or the hearing of
12 the matter shall be assigned or transferred to
13 another judge, court commissioner, or referee
14 of the court in which the trial or matter is
15 pending or, if there is no other judge, court
16 commissioner, or referee of the court in which
17 the trial or matter is pending, the Chair of
18 the Judicial Council shall assign some other
19 judge, court commissioner, or referee to try
20 the cause or hear the matter as promptly as
21 possible. Except as provided in this section,
22 no party or attorney shall be permitted to make
23 more than one such motion in any one action or
24 special proceeding pursuant to this section;
25 and in actions or special proceedings where
26 there may be more than one plaintiff or similar
27 party or more than one defendant or similar
28 party appearing in the action or special
proceeding, only one motion for each side may
be made in any one action or special proceeding.
(4) Unless required for the convenience of the
court or unless good cause is shown, a
continuance of the trial or hearing shall not
be granted by reason of the making of a motion
under this section. If a continuance is
granted, the cause or matter shall be continued
from day to day or for other limited periods
upon the trial or other calendar and shall be
reassigned or transferred for trial or hearing
as promptly as possible. (Emphasis added.)

22 In the case of Le Louis v. Superior Court, (1989)
23 209 Cal.App. 3d 669, the court defined an action and a
24 special proceeding:

25 "Judicial remedies are divided into two classes:
26 (1) actions and (2) special proceedings. (Code Civ.
27 Proc., §§ 21.) An action is an ordinary proceeding
28 in a court of justice by which one party prosecutes
another for the declaration, enforcement, or

1 protection of a right, the redress or prevention of
2 a wrong, or the punishment of a public offense.
3 (Code Civ. Proc., §§ 22.) Every other remedy is a
4 special proceeding. (Code Civ. Proc., §§ 23.)
5 Actions are of two kinds: (1) civil and (2)
6 criminal. (Code Civ. Proc., §§ 24.) The Penal Code
7 defines and provides for the prosecution of a
8 criminal action. (Code Civ. Proc., §§ 31.)
9 "The proceeding by which a party charged with a
10 public offense is accused and brought to trial and
11 punishment, is known as a criminal action." (Pen.
12 Code, §§ 683.)"

13 Id., at 677.

14 In the case of Stephens v. Superior Court, (2002) 96
15 Cal.App.4th 54, 61-62 the court determined the standard
16 of reviewing a peremptory challenge, saying:

17 "As a remedial statute, section 170.6 is to be
18 liberally construed in favor of allowing a peremptory
19 challenge, and a challenge should be denied only if the
20 statute absolutely forbids it. (People v. Superior
21 Court (Williams), supra, 8 Cal.App.4th at pp. 697-698.)"

22 In Lyons v. Superior Court, (1977) 73 Cal.App.3d
23 625, a defendant entered a conditional guilty plea in
24 municipal court. After a superior court judge refused
25 to accept the plea, the matter was remanded to the
26 municipal court where the defendant entered a different
27 conditional guilty plea. When the matter was assigned
28 to the same superior court judge who had rejected the
first plea, the defendant filed a disqualification
motion. It was timely. The "hearing on the second plea
bargain ... is a separate proceeding from the hearing
on the original plea bargain. When the plea was
rejected the matter was remanded to the municipal court

1 for further proceedings. Potentially those further
2 proceedings could have resulted in another plea.... In
3 any event, when the matter was thereafter certified
4 again to the superior court ..., a new file number was
5 given to the case. The hearing on the new conditional
6 plea is not merely a 'continuation of the main
7 proceeding' [citations], but rather a separate
8 proceeding in which different determinations might be
9 reached." (Id. at pp. 628-629. Emphasis added.)

10 In Paredes v. Superior Court, (1999) 77 Cal.App.4th
11 24, 32-33, the court said:

12 "Subdivision (3) of the statute bars any party from
13 making more than one motion 'in any one action or
14 special proceeding;' by negative implication, in
15 two successive actions a party may move to
16 disqualify in each, or may disqualify in the later
17 action without waiving that right by failing to so
18 move in the earlier. The wording of the statute
19 thus appears to foreclose any argument premised on
20 the doctrine of collateral estoppel." (Solberg v.
21 Superior Court, supra, 19 Cal.3d at p. 190, fn. 6."

18 In the case before the bench the People have not
19 exercised a peremptory challenge. The case at bench is
20 a criminal action and did not come into existence until
21 the defendant was charged. (See Le Louis v. Superior
22 Court, supra, at 677.) The prior action involving the
23 Modesto Bee was a separate action and had a separate
24 case number. (See Lyons v. Superior Court, supra, at
25 629.) The statute is to be liberally construed to allow
26 a party to exercise a challenge; the People have not
27 exercised that right in this action and therefore
28

1 retain that right until further application of the
2 statute. The Modesto Bee action is a separate action
3 within the meaning of the statute and the doctrine of
4 collateral estoppel is not applicable. (See Solberg v.
5 Superior Court, (1977) 19 Cal.3d 182, 190, fn. 6.)

6 The fact that this case is a special circumstance
7 case or according to the defense, may involve issues
8 that were raised in the Modesto Bee case does not
9 change this analysis. In the case of Waldon v. Superior
10 Court, (1987) 196 Cal.App.3d 809 the court said that a
11 Penal Code section 1368 proceeding was separate and
12 distinct from the criminal action from which it arose.
13 The defendant was therefore entitled to exercise a
14 separate section 170.6 challenges in the competency
15 hearing and the criminal action. Waldon was a death
16 penalty case.

17 18 Conclusion

19 The People have not exercised a peremptory
20 challenge in this case pursuant to Code of Civil
21 Procedure §170.6 and the People's challenge in action
22 number 1045098 does not apply to this case. Action

23 ///

24 ///

25 ///

26

27

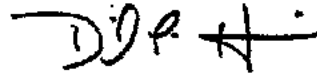
28

1 1045098 does also not collaterally effect the People in
2 this case.

3 Dated this 3rd day of May, 2003, at Modesto,
4 California.

5
6 Respectfully submitted,

7 JAMES C. BRAZELTON
8 District Attorney

9 

10 David P. Harris
11 Senior Deputy District Attorney
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28