SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 227	**Hearing Date:**	April 21, 2015
Author:	Mitchell		
Version:	March 19, 2015		
Urgency:	No	**Fiscal:**	No
Consultant:	JRD		

Subject: ***Grand Juries: Powers and Duties***

HISTORY

Source: Author

Prior Legislation: None known

Support: California State Conference of The National Association for the Advancement of Colored People; Friends Committee of Legislation of California; California Public Defenders Association; California Attorneys for Criminal Justice; Office of the independent Police Auditor, City of San Jose

Opposition: California District Attorneys Association

PURPOSE

The purpose of this legislation is to prohibit a grand jury from inquiring into an offense that involves a shooting or use of excessive force by a peace officer, as specified, that led to the death of a person being detained or arrested by the peace officer, as specified.

Existing law provides that one or more grand juries shall be drawn and summoned at least once per year in each county. (California Constitution Article I, Section 23.)

Existing law requires that in all counties there shall be at least one grand jury drawn and impaneled in each year. (Penal Code § 905.)

Existing law provides that when the grand jury is impaneled and sworn, it shall be charged by the court and the court shall give the grand jurors such information as it deems proper, or as is required by law, as to their duties and as to any charges for public offenses returned to the court or likely to come before the grand jury. (Penal Code § 914(a).)

Existing law provides that the grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment. (Penal Code § 917.)

Existing law states that if a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county has been committed, he may declare it to his fellow jurors, who may investigate it. (Penal Code § 918.)

Existing law states that a grand jury may inquire into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted. (Penal Code § 919(a).)

Existing law states that a grand jury shall inquire into the condition and management of the public prisons within the county. (Penal Code § 919(b).)

Existing law states that a grand jury shall inquire into the willful or corrupt misconduct in office of public officers of every description within the county. (Penal Code § 919(c).)

This bill would prohibit a grand jury from inquiring into an offense that involves a shooting or use of excessive force by a peace officer, as specified, that led to the death of a person being detained or arrested by the peace officer, as specified.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;

- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for Legislation

According to the Author:

> SB 227 prohibits the use of a criminal grand jury when evidence indicates a peace officer's use of excessive force or a firearm may have contributed to the death of a person being detained or arrested by the peace officer.
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> There is virtually no available information on how criminal grand juries are used in California; no data on the number of cases that are heard, the kinds of cases that are heard, or the outcomes of those proceedings. Some counties (specifically Los Angeles and Santa Clara counties) have adopted policies that preclude the criminal grand jury being used in cases where an officer's actions may be the cause of the death of a suspect. However, these policies have been instituted at the will of the county's district attorneys and are subject to change at any time.
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> The grand jury system has recently come under fire nationally as several incidents of officer-involved deaths have resulted in the officers in question being released without charges. To the public who has witnessed these incidents, the outcome of the criminal grand jury proceedings can seem unfair or inexplicable. The criminal grand jury system lacks transparency and is not adversarial in nature; No judges or defense attorneys participate. The rules of evidence do not apply; there are no cross-examinations of witnesses, and there are no objections.
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> When the actions of a peace officer result in the death of a member of the public, it is crucial that there is transparency in court proceedings. Transparency and accountability are key to establishing and keeping the trust of the public.

2. Recent Events

In the wake of the deaths of Eric Garner and Michael Brown, Judge La Doris Cordell called for abolishing the grand juries in a recent editorial:

> In state courts, judges preside over probable cause hearings called preliminary examinations. These "prelims" are open to the public, and they are adversarial. Witnesses are questioned and cross-examined by prosecutors and defense attorneys, all of whom must abide by the rules of evidence.
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> About half of the states have both prelims and criminal grand juries. In these states, it is in the sole discretion of prosecutors whether to hold prelims or to convene grand juries. Unlike prelims, criminal grand jury proceedings are not

adversarial. No judges or defense attorneys participate. The rules of evidence do not apply; there are no cross-examinations of witnesses, and there are no objections. How prosecutors explain the law to the jurors and what prosecutors say about the evidence are subject to no oversight. And the proceedings are shrouded in secrecy.

In high-profile, controversial cases, where officers use lethal force, prosecutors face a dilemma. If they don't file charges against officers, they risk the wrath of the community; if they do file charges, they risk the wrath of the police and their powerful unions. By opting for secret grand jury proceedings, prosecutors pass the buck, using grand jurors as pawns for political cover. The Michael Brown and Eric Garner cases are examples of how prosecutors manipulate the grand jury process.

In the Michael Brown case, an assistant prosecutor gave an instruction to the jurors about the law on an officer's reasonable use of force. However, in 1985 the U.S. Supreme Court revised this law by placing some limits on the use of force. When officer Darren Wilson testified, the jurors understood his story within the framework of the erroneous, broader definition of the use of force. It was not until weeks later that the prosecutor acknowledged her error; and even then, she failed to explain to the jurors how the current law differed from the pre-1985 version. This egregious error would not have occurred had a judge and defense attorney been in the room.

The version of Michael Brown's shooting that the grand jurors heard was engineered by the prosecutors, who vigorously questioned witnesses when their testimony contradicted Wilson's story and barely questioned witnesses whose testimony supported the officer's version. Wilson received especially lenient treatment by the lead prosecutor. The final question he asked was whether there was anything else that Wilson wanted the jurors to know. He did:

> One of the things you guys haven't asked that has been asked of me in other interviews is, was he a threat, was Michael Brown a threat when he was running away. People asked why would you chase him if he was running away now. I had already called for assistance. If someone arrives and sees him running, another officer and goes around the back half of the apartment complexes and tries to stop him, what would stop him from doing what he just did to me to him or worse … he still posed a threat, not only to me, to anybody else that confronted him.

There was no defense attorney to question Wilson's self-serving statement to the jurors.

The prosecutor improperly asked Wilson leading questions that suggested the answers the prosecutor wanted. For example, he asked the officer, "So, you weren't really geared to handle that call?" And: "So nobody heard you say 'shots fired' to your knowledge?" And: "In your mind, him grabbing the gun is what made the difference where you felt you had to use a weapon to stop him?" At one point, the prosecutor allowed Wilson to give an uninterrupted 1,889-word narrative about the shooting.

> All that we know about the Eric Garner grand jury proceeding is that a majority of the grand jurors refused to indict the officer. We will never know why there was no indictment because what the prosecutors said, how they said it, what evidence they presented, and what they asked the witnesses will forever remain secret, unless the transcript is opened to the public by court order.
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> Secrecy in grand jury proceedings was intended to protect the reputations of the *unindicted*, individuals accused of crimes who grand jurors determined should not stand trial. The entire world knew the names of the unindicted officers in the Garner and Brown cases. Grand jury secrecy did nothing to protect their reputations.
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> By convening grand juries, the prosecutors in Missouri and New York ensured that there would be no justice for Michael Brown and Eric Garner. Sadly, these two men are gone. But if we abolish criminal grand juries, at least their deaths will not have been in vain.

(*Grand Juries Should be Abolished*, LaDoris Hazard Cordell, December 9, 2014, http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_garner_and_michael_brown.single.html?print.)

3. Effect of This Legislation

This legislation would prohibit a grand jury from inquiring into an offense that involves a shooting or use of excessive force by a peace officer that led to the death of a person being detained or arrested. As discussed in an opinion by the Attorney General's office, a grand jury typically hears matters that are brought by the district attorney, but has the ability to initiate its own investigation.

> The accusatory functions of the grand jury authorized by section 917 and Government Code section 3060 are usually initiated by the district attorney who is authorized by section 935 to present evidence of crime or official misconduct to the grand jury. The district attorney will have had the offense investigated and will have marshalled the evidence relevant thereto prior to its presentation to the grand jury. The grand jury then evaluates the evidence in secret deliberations (see §§ 939, 924.2) and decides by vote whether to issue an indictment or accusation. This investigative process on which an indictment or accusation may be founded may be styled a formal investigation by the grand jury. All testimony must be sworn and only evidence which is admissible over objection in a criminal trial may be received in such formal investigations. (§ 939.6.) A stenographic reporter must record the testimony in shorthand and prepare a transcript thereof. (§§ 938 & 938.1.) An indictment can be found only with the concurrence of 12 grand jurors (14 for 23 member grand juries) and 12 votes are also required for an accusation. (See § 640 & Gov. Code, § 3060.) Grand jurors voting for an indictment must have heard all of the evidence presented thereon. (*Stern v. Superior Court* (1947) 78 Cal.App.2d 9, 16.)

(Office of the Attorney General of the State of California, No. 83-903, 67 Ops. Cal. Atty. Gen. 58.)

The opinion goes on to state:

> The grand jury is not limited to matters initiated by the district attorney in performing its accusatory role. Section 918 provides:
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> "If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he may declare it to his fellow jurors, who may thereupon investigate it."

(*Id.*)

As currently drafted, this legislation could be read to limit the ability of a grand jury to, on its own, initiate an investigation into an offense that involves a shooting or use of excessive force by a peace officer that led to the death of a person being detained or arrested. In order to preserve the ability of the grand jury to investigate such matters on its own, members may wish to consider recommending an amendment stating that the prohibitions added by this legislation are not intended to impede the powers provided to the grand jury in Penal Code Section 918.

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