SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 1024	**Hearing Date:**	June 13, 2017
Author:	Kiley		
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Urgency:	No	**Fiscal:**	No
Consultant:	GC		

Subject: ***Grand Juries: Peace Officers: Proceedings***

HISTORY

Source: California District Attorneys Association

Prior Legislation: SB 227 (Mitchell) Chapter 175, Statutes of 2015

Support: California Police Chiefs Association; Peace Officers Research Association of California; San Diego District Attorney's Office

Opposition: American Civil Liberties Union

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this legislation is to require a court to disclose all or a part of an indictment proceeding when the grand jury decides not to return an indictment for an offense that involves a peace officer shooting or use of excessive force that results in death of a detainee or arrestee.

Existing law provides that prosecutors may initiate a criminal action either by filing a complaint before a magistrate or a grand jury indictment in the superior court. (Cal. Const. Art. I, § 14; Pen. Code, §§ 737-740, 889, 949.)

Existing law provides that one or more grand juries must be drawn and summoned at least once per year in each county. (Cal. Const. Art. I, § 23.)

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

Existing law provides that when the grand jury is impaneled and sworn, it is charged by the court and the court must give the grand jurors the information it deems proper, or required by law, regarding their duties and any charges for public offenses returned to the court or likely to come before the grand jury. (Pen. Code, § 914, subd. (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, except an offense that involves a peace officer shooting or use of excessive force resulting in death of a detainee or arrestee. (Pen. 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, that grand juror may declare it to his or her fellow jurors, who may investigate it. This provision applies to an offense that involves a peace officer shooting or use of excessive force resulting in death of a detainee or arrestee. (Pen. Code, §§ 917 & 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. (Pen. Code, § 919, subd. (a).)

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

Existing law states that a grand jury must inquire into the willful or corrupt misconduct in office of public officers within the county, except misconduct that involves a peace officer shooting or use of excessive force resulting in death of the arrestee or detainee. (Pen. Code, § 919, subd. (c).)

Existing law provides that whenever the Attorney General considers that public interest requires it, he or she may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of criminal matters that he or she wishes to submit to it. He or she may take full charge of the presentation of the matters to the grand jury, issue subpoenas, prepare indictments, and do all other incidental things to the same extent as the district attorney may do. (Pen. Code, 923, subd. (a).)

Existing law specifies that every grand juror who, except when required by a court, willfully discloses any evidence presented to the grand jury, or anything which that grand juror or any other member of the grand jury has said, or how a grand juror has voted on a matter before them, is guilty of a misdemeanor. (Pen. Code, § 924.1, subd. (a).)

Existing law allows the district attorney of the county to at all times appear before the grand jury for the purpose of giving information or advice relative to any matter into which the grand jury may inquire, and may interrogate witnesses before the grand jury whenever he or she thinks it necessary, except when the grand jury is investigating a charge against or involving the district attorney, or someone employed by or connected to the district attorney's office. In the latter case, the district may be present only while a witness. (Pen. Code, § 935.)

Existing law provides that, generally, hearsay evidence that would be inadmissible during a trial may not be presented to a grand jury. The fact that inadmissible hearsay was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received. (Pen. Code, § 939.6, subd. (b).)

Existing law allows law enforcement officers with specified training and experience to testify to an out-of-court statement by a third party. (Pen. Code, § 939.6, subd. (c).)

Existing law states that if an indictment has been found or accusation presented against a defendant, the court reporter shall certify and deliver a transcript of the grand jury proceedings to the superior court clerk. (Pen. Code, § 938.1, subd. (a).)

Existing law provides that the transcript shall be open to the public, as specified, unless the court orders otherwise on its own motion or on motion of a party pending a determination as to whether all or part of the transcript should be sealed. If the court determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial, that part of the transcript shall be sealed until the defendant's trial has been completed. (Pen. Code, § 938.1, subd. (b).)

Existing law allows the grand jury, as specified, to make a written request for public sessions of the grand jury. If the court finds that the subject matter of the investigation affects the general public welfare, involving the alleged corruption, misfeasance, or malfeasance in office or dereliction of duty of public officials or employees or of any person allegedly acting in conjunction or conspiracy with such officials or employees in the alleged acts, the court or judge may order the grand jury to conduct its investigation in a session or sessions open to the public. (Pen. Code, § 939.1, subd. (a).)

This bill requires a court to disclose all or a part of an indictment proceeding when the grand jury decides not to return an indictment for an offense that involves a peace officer shooting or use of excessive force that results in death of a detainee or arrestee.

This bill requires the court that impaneled a grand jury to disclose all or a part of the indictment proceeding, excluding the grand jury's private deliberations, to a party who moves for disclosure, under the following circumstances:

- The grand jury inquires into a peace officer-involved shooting or use of excessive force that resulted in death of a person being detained or arrested by the peace officer;
- The grand jury decides not to return an indictment;
- The district attorney, a legal representative of the deceased person, or a legal representative of the news media or public applies for disclosure of the indictment proceeding;
- The district attorney and the affected law enforcement person involved are given notice and an opportunity to be heard; and
- Unless, following an in camera hearing, the court finds that disclosure, either total or partial, is against public interest because of a continued need for secrecy or redaction to protect the safety of witnesses who testified or were identified at the grand jury indictment hearing.

COMMENTS

1. Need for This Bill

According to the author:

> The grand jury system has been the subject of intense national scrutiny in recent years, particularly after high profile cases against police officers in Missouri and New York yielded no indictments from their respective grand juries. While the

use of the criminal grand jury is relatively rare in cases of officer-involved shootings in California, it can be an appropriate and useful prosecutorial tool in cases where evidence is unclear, subject to conflicting accounts, or where witnesses are reluctant to cooperate, as is often the case in use of force investigations.

Unlike a standard criminal investigation, grand juries have subpoena power, and witnesses testify under penalty of perjury. Further, Penal Code Section 939.6(b) requires, with very limited exceptions, that "the grand jury shall not receive any evidence except that which would be admissible over objection at the trial of a criminal action." Additionally, Section 939.71 requires the prosecutor to disclose any evidence favorable to the defendant – a requirement that does not exist in most other states, or in the federal grand jury system. For these reasons, California grand juries offer a fuller seeking of the truth for all sides – by live testimony – than the often "assembly-line" grand juries found in other states.

One common criticism of the grand jury, especially in these types of cases, is the perceived lack of transparency regarding what happens inside the courtroom, and the lack of community access to the process. The role of the criminal grand jury is not to decide guilt or innocence, but rather to determine whether probable cause exists to suggest that the defendant committed the alleged offense. Penal Code Section 938.1 requires that if an indictment is returned, a transcript of the grand jury proceedings be prepared and delivered to the prosecution and defense, and then opened to the public within 10 days, unless a court orders otherwise. However, if no indictment is returned, the law prevents the transcript from being released. This feeds the negative perception of the grand jury process, and prevents the public from gaining a full understanding of what has taken place.

Two years ago, Senate Bill 227 (Chapter 175, Statutes of 2015) prohibited the use of a grand jury in cases involving an officer-involved shooting or use of force that results in death. In January 2017, California's 3rd District Court of Appeal held that law to be an unconstitutional abrogation of the authority of the criminal grand jury. In April 2017, the California Supreme Court denied review of the case, therefore upholding the lower court's ruling.

In light of that decision, Assembly Bill 1024 would provide appropriate transparency when a grand jury is used to investigate these cases by authorizing the preparation and distribution of transcripts of grand jury proceedings when no indictment is returned.

2. Grand Jury Proceedings vs. Preliminary Hearings

California has two procedural mechanisms to make probable cause determinations in felony cases. In California, the prosecution begins a felony case either by filing a grand jury indictment in the trial court or by filing a complaint with a magistrate. (Cal. Const., art. I, § 14.) If a complaint is filed, a preliminary hearing must be held before a magistrate to demonstrate that there is enough evidence to hold the defendant to answer in the trial court. (Pen. Code, § 872.) When a grand jury indictment is filed, there is no right to a preliminary hearing. (*Bowens v. Superior Court* (1991) 1 Cal.4th 36.)

The majority of cases proceed by preliminary hearing. At a preliminary hearing, the prosecution must present sufficient evidence to convince the magistrate that probable cause exists to believe that a crime has been committed and that the defendant committed it. (Pen. Code §§ 872 & 995.)

If the prosecution shows probable cause, the magistrate will hold the defendant to answer to the charge in the trial court. The prosecution must then file an information in the court within 15 days. (Pen. Code §§ 739 & 1382, subd. (a)(1).)

Preliminary hearings afford the accused a public hearing, with defense counsel present, before a neutral magistrate. Grand juries, on the other hand, are not adversarial in nature; the defense attorney and the accused are not present, and the proceedings are held in secret. Additionally, when grand juries are utilized, witnesses are not subject to cross-examination and evidence presented is not subject to objection on issues of admissibility. (Cal. Criminal Law: Procedure and Practice (Cont. Ed.Bar 2016) § 9.7, pp. 217-218.)

3. Grand Jury Secrecy

[A] grand jury indictment proceeding is conducted in complete secrecy. The only persons present other than the grand jury are District Attorney representatives, a court reporter, who is sworn to secrecy, and witnesses, who testify one at a time. The witnesses are not allowed to have an attorney present, but may consult with an attorney outside the hearing room when the witness deems it necessary to seek legal advice. Since there are no attorneys present other than the prosecutor, there is no cross examination. All testimony is taken under oath.

The jury foreperson presides and one of the jurors takes the role of a court clerk by calling witnesses, keeping track of evidence and performing other similar duties. Jurors may ask questions, but they are written and submitted to the prosecutor conducting the hearing to determine that they meet the rules of evidence. The prosecutor is required to introduce exculpatory evidence, which is evidence that might mitigate the likelihood of an indictment; in other words, evidence in favor of the accused.

An indictment, endorsed as a "true bill," may be submitted to the court only if at least a 'supermajority' of grand jurors concurs. (PC §940).[1]

While the grand jury hearing itself is secret, existing law does provide that a transcript of the grand jury hearing be made available to the public *if there is a criminal indictment*. In that case, a transcript of the grand jury hearing must be provided to the court within 10 days. (Pen. Code, § 938.1, subd. (a).) That time frame can be extended by a judge for up to 20 days based on good cause. The transcript of the grand jury hearing will be open to the public 10 days after it has been provided to the defendant, or the defendant's attorney, except under specified circumstances. (Pen. Code, § 938, subd. (b).)

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[1] (The California Grand Jurors' Association, The California Grand Jury System (Apr. 2014), pp. 10-11 <https://cgja.org/sites/cgja.org/files/The%20California%20Grand%20Jury%20SystemEdition3.pdf> [as of March 18, 2017].) "Supermajority" means 12 of 19 jurors in most counties, 14 of 23 in Los Angeles County, and 8 of 11 in some of the smaller counties. (*Id*. at p. 12; see also Pen. Code, § 940.)

4. Movement Away From Secrecy in Controversial Cases Involving Lethal Force

In the context and wake of the deaths of Eric Garner and Michael Brown, Judge LaDoris Cordell highlighted concerns regarding the use of grand juries in these high-profile, controversial cases, where officers use lethal force:

> 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.
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> 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.
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> 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.
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> 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:
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> > 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.

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.

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.[2]

5. California Legislative Efforts to Increase Visibility in Grand Jury Proceedings

To help make judicial proceedings more transparent and accountable, SB 227 (Mitchell) Chapter 175, Statutes of 2015, prohibited a grand jury inquiry into an offense that involves a shooting or use of excessive force by a peace officer resulting in the death of a person being detained or arrested by the peace officer. (See Pen. Code, §§ 917.) Recently, however, the Third District Court of Appeal found this law unconstitutional. (*People v. ex rel. Pierson v. Superior Court* (2017) 7 Cal.App.5th 402.) The court reasoned that the Legislature does not have the power to enact a statute that limits the constitutional power (Cal. Const. Art. I, § 14) of a criminal grand jury to indict any adult accused of a criminal offense. (*Id*. at pp. 413-414.) The court noted: "The Legislature is not powerless to remedy the problem it has identified. It may submit a constitutional amendment to the electorate to remove the grand

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[2] (Cordell, *Grand Juries Should be Abolished* (Dec. 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> [as of Mar. 18, 2017].)

jury's power to indict in cases involving a peace officer's use of lethal force. *It could also take the less cumbersome route of simply reforming the procedural rules of secrecy in such cases, which are not themselves constitutionally derived or necessary to the grand jury's functioning….* (*Id.* at p. 414, emphasis added.)

On April 12, 2017 the California Supreme Court denied the Attorney General's request that the court grant review of the Third Appellate District's opinion. The court stated in their denial that the "matter is now final." Based on this denial, the Court of Appeal's decision is now final, and the Legislature does not have the authority to impinge on the grand jury's constitutional power to indict. This bill is in line with the Court of Appeal's suggested remedy of "reform[ing] the procedural rules of secrecy in such cases." (*People v. ex rel. Pierson v. Superior Court, supra*, 7 Cal.App.5th at p. 414.) This bill would further transparency and accountability by authorizing the court to make grand jury proceedings public in cases involving fatal officer-involved shootings and use of excessive force, when the grand jury does not return an indictment. Current law provides for the transcript of a grand jury proceeding to be made public only if there is an indictment. (Pen. Code, § 938, subds. (a) & (b).)

6. Vagueness of the Standard for Disclosure

While moving towards transparency and accountability, this bill does contain a provision that would allow the court to prevent full or partial disclosure if it found such disclosure was not in the public interest. Specifically, this bill will permit disclosure "*unless the court finds, following an in camera hearing, that disclosure, either total or partial, is not in the public interest because of a continued need for secrecy or redaction to protect the safety of witnesses who testified or were identified at the grand jury indictment hearing.*"

Opponents of this legislation argue that this vague standard is so broad that information would not be released and the disclosure requirements are not effective. This raises the question of whether a standard by which the court must make this finding should be specified. If so, what standard? Is this provision necessary?

7. Argument in Support

According to the California Police Chiefs Association:

> The grand jury system has been the subject of intense national scrutiny in recent years, particularly after high profile cases against police officers in Missouri and New York yielded no indictments from their respective grand juries. While the use of the criminal grand jury is relatively rare in cases of officer-involved shootings in California, it can be an appropriate and useful tool in cases where evidence is unclear, subject to conflicting accounts, or where witnesses are reluctant to cooperate, as is often the case in use of force investigations.
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> AB 1024 would provide additional transparency and help restore public confidence in California's grand jury system by allowing transcripts to be released when no indictment is returned.

8. Argument in Opposition

According to the American Civil Liberties Union:

> As currently written, this bill would establish a broad and vague standard that could prevent disclosure of such proceedings.
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> The recent deaths of people of color at the hands of law enforcement have led to heightened public concerns about law enforcement accountability. Within this context, grand jury exonerations, reached in complete secrecy, have been perceived by wide segments of the public as unfair and inexplicable, particularly when there is eyewitness or video evidence that seems to conflict with the decision.
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> The secrecy of grand jury proceedings was intended to protect the reputations of people accused of crimes who grand jurors determine should not be prosecuted. However, the names of officers involved in shootings are already public under California law,[3] and many of the incidents that garner the greatest public concern are those captured by video recordings that have been widely viewed. Thus, the secrecy of grand juries does not prevent officers' notoriety. In the end, the public knows the identity of the officer who killed the civilian and many of the details of the incident, but, due to the secrecy of grand juries, has no way to know whether the allegation has been taken seriously and thoroughly investigated in a manner that is fair and objective. This discrepancy severely erodes trust in the criminal justice system.
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> Although AB 1024 intends to address the critical problem of secrecy in grand juries, it falls short. The bill states that the court may prevent disclosure "because of a continued need for secrecy or redaction to protect the safety of witnesses who testified or were identified at the grand jury indictment hearing." This vague language could essentially provide unfettered discretion to withhold indictment proceedings of a grand jury inquiry from the public, making it unlikely that any information of public concern would actually be released.
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> For these reasons, we must oppose AB 1024 unless it is amended to address this concern.

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[3] 59 Cal.4th 59, 172 Cal. Rptr. 3d 56, 325 P.3d 460