

## Articles

# Prosecutors & Criminal Grand Juries Investigating Peace Officer Fatal Force Cases: How the California Legislature's 2015 Response to a National Tragedy Defied Both Logic and the Constitution

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### Introduction

PEACE OFFICERS SHOOTING or otherwise using fatal force on criminal suspects in their custody has become an enormously charged issue in recent years, with ripple effects throughout society. From events in Ferguson, Missouri<sup>1</sup> and Staten Island, New York<sup>2</sup> in 2014, to tragic incidents in Baton Rouge, Louisiana and Falcon Heights, Minnesota in 2016,<sup>3</sup> these deaths of unarmed men in encounters with our armed guardians of public safety have spawned ever-widening cycles of

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1. See *infra* Section I.B.

2. See *infra* Section I.A.

3. See generally Matt Furber & Richard Perez-Pena, *After Philando's Castile's Killing, Obama Calls Police Shooting 'an American Issue'*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> <https://perma.cc/6K9N-HUVP>].

major unrest: social movements, public protests, riots, and—equally sad—lone-wolf assassinations of unsuspecting peace officers.<sup>4</sup>

On the primarily legal stage, how the criminal justice systems throughout our nation have dealt with these custodial deaths—and particularly the use of local grand juries by county prosecutors—has itself created political controversy and enflamed further social upset. Two states, New York and California, have responded in quite contrasting manners: New York instituted a rule for initial independent review of such cases by the state’s Attorney General before local prosecutors can act,<sup>5</sup> and California’s Legislature enacted a ban on both local and state prosecutors from taking such cases to their grand juries entirely.<sup>6</sup>

This article will first discuss the recent historical antecedents of peace officer fatal force encounters, with selected examples from around the nation involving local grand juries. Next, we briefly examine the New York response and an example of local prosecutor backlash to primary supervision by the state. Then, in more detail because of the drastic nature of the solution, we delve into the legislative history of California’s Senate Bill 227 (“SB 227”) of 2015 which enacted Penal Code section 917(b) as of January 1, 2016, to remove such cases completely from grand jury indictment jurisdiction. In this discussion, we suggest that such a legislative response is not only unwise (creating ethical issues as well) and unlikely to produce the desired result sought by the Legislature,<sup>7</sup> but also, ultimately, *unconstitutional*. In the final section, we detail not only the many-pronged legal arguments against constitutionality,<sup>8</sup> but also carefully note a currently-pending appellate challenge to California’s new law that we have been involved in, one since days after the law’s passage.<sup>9</sup>

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4. *Id.* The incidents in Baton Rouge and Falcon Heights, occurring just days apart in July 2016, are not discussed in this article, but serve to show that peace officer fatal force incidents continue, apparently unabated. The Washington Post is maintaining a database on all such cases in the country since 2015, organizing the deceased by gender, race, and other pertinent data that sheds light on the crisis through a detailed look at the numbers. *See also 990 People Shot by Police in 2015*, WASHINGTON POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Nov. 2016) [<https://perma.cc/N5HD-L94A>].

5. *See infra* Section II.A.

6. *See infra* Section II.B.

7. *See infra* Part III.

8. *See infra* Part IV.

9. For a discussion of the January 10, 2017 published opinion issued by the Third District Court of Appeal, finding SB 227 unconscionable, *see infra* Section VI.

## I. Recent Events

### A. Eric Garner—Staten Island, New York

On July 17, 2014, Eric Garner was in the Tompkinsville section of Staten Island, New York, allegedly selling untaxed cigarettes near the Staten Island Ferry Terminal, an act for which he had been previously arrested several times.<sup>10</sup> After being questioned by the officers, Garner said he did nothing wrong and asked to be left alone.<sup>11</sup> The entirety of the incident was captured on cellphone video. In an attempt to arrest him, one officer reached around Garner's neck and placed him in a chokehold.<sup>12</sup> The officers then wrestled him to the ground: Officer Daniel Pantaleo held his head to the ground while Officer Justin D'Amico handcuffed him.<sup>13</sup> Throughout the encounter, Garner repeated, "I can't breathe" to the officers.<sup>14</sup> Garner died later that day at a local hospital.<sup>15</sup>

The New York medical examiner ruled the manner of Garner's death a homicide.<sup>16</sup> The cause of death was a combination of the chokehold that resulted in neck and chest compressions, Garner's pre-existing medical conditions including being overweight, and having chronic asthma and cardiovascular disease.<sup>17</sup>

The Staten Island District Attorney's Office brought charges against Officer Pantaleo to a state grand jury in early September 2014.<sup>18</sup> The grand jury heard from the officers involved and twenty-two civilian witnesses, which included findings from emergency re-

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10. James Queally & Alana Semuels, *Eric Garner's Death in NYPD Chokehold Case Ruled A Homicide*, L.A. TIMES (Aug. 1, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-garner-homicide-20140801-story.html> [<https://perma.cc/DT2Q-G499>].

11. *Id.*

12. *Id.*

13. *Id.*; see also, Al Baker, J. David Goodman, & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/JR3H-YPXQ>].

14. Queally & Semuels, *supra* note 10.

15. Baker, Goodman, & Mueller, *supra* note 13.

16. Queally & Semuels, *supra* note 10.

17. James Queally & Alana Semuels, *Eric Garner's Death in NYPD Chokehold Case Ruled A Homicide*, L.A. TIMES (Aug. 1, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-garner-homicide-20140801-story.html> [<https://perma.cc/CLK8-SY9M>].

18. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<https://perma.cc/E7JW-2GUA>].

sponders at the scene, experts of forensic pathology, and experts in police procedure and training.<sup>19</sup>

On, December 3, 2014, after less than a day of deliberation, the Staten Island grand jury decided not to indict Officer Pantaleo.<sup>20</sup> The District Attorney's Office petitioned the court to publicly release specific information about the results of the grand jury investigation, other than the testimony and exhibits shown.<sup>21</sup>

Then, on March 19, 2015, a court ruled against publicly releasing the grand jury minutes from its investigation, citing that the party requesting the release, the New York Civil Liberties Union ("NYCLU"), did not establish its burden of "compelling and particularized need."<sup>22</sup> The NYCLU argued that the public needed to reconcile the grand jury's decision with what it observed in the widely publicized cellphone footage, and the possibility of effecting change in legislation (yet the NYCLU did not provide any specific legislative action).<sup>23</sup> The court ruled that the NYCLU's argument was purely speculative, and that the security of the witnesses and the jurors was imperative.<sup>24</sup> As state supreme court Justice William Garnett wrote, "It is in such notorious cases that witnesses' cooperation and honesty should be encouraged—not discouraged—for fear of disclosure."<sup>25</sup>

The NYCLU appealed the lower court's ruling and, on July 29, 2015, the state supreme court appellate division panel affirmed.<sup>26</sup> The justices were concerned with why the NYCLU wanted to focus on just this particular grand jury, instead of the system as a whole, if its goal was to improve the perception of fairness within all grand juries.<sup>27</sup>

A federal investigation is ongoing, and a federal grand jury investigation began on February 10, 2016 into whether Garner's civil rights were violated when Officer Pantaleo used force to restrain him.<sup>28</sup> As

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19. *Id.*

20. *Id.*

21. *Id.*; see also *Judge Makes Decision on Secret Testimony in Garner Case*, CBS NEWS (Mar. 19, 2015), <http://www.cbsnews.com/news/eric-garner-grand-jury-testimony-new-york-judge/> [<https://perma.cc/H7XQ-77RZ>].

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Appeals Court: Grand Jury records in Eric Garner case stay sealed*, CBS NEWS (July 29, 2015, 6:07 PM), <http://www.cbsnews.com/news/appeals-court-grand-jury-records-in-eric-garner-case-stay-sealed/> [<https://perma.cc/ADY2-GNU4>].

27. *Id.*

28. John Marzulli, *Justice Department presents evidence to grand jury in police choking death of Eric Garner to determine if Staten Island man's civil rights were violated*, N.Y. DAILY NEWS (Feb.

of January 20, 2017, the end of the Justice Department under the Obama administration,<sup>29</sup> there has been no agreement as to whether to file civil charges.<sup>30</sup>

### B. Michael Brown–Ferguson, Missouri

Just before noon on August 9, 2014, Michael Brown shoved aside a convenience store clerk to steal a handful of cigarillo packs and left the store with one of his friends.<sup>31</sup> Police dispatch radioed “stealing in progress” for officers in the area to respond.<sup>32</sup> Officer Darren Wilson was nearby in his patrol vehicle when he came upon two young men walking in the middle of the street who matched the description of the suspects, one of whom was holding a handful of cigarillo packs.<sup>33</sup> Officer Wilson drove up beside the two men and told them to move to the sidewalk.<sup>34</sup> He then called for backup and pulled his vehicle in front of the men, blocking the street ahead.<sup>35</sup> Upon attempting to exit his vehicle, Officer Wilson opened the door and it is unclear whether the door rebounded off of Brown or Brown pushed it shut again.<sup>36</sup> Brown then reached his arm into the patrol vehicle, and grabbed and punched Officer Wilson in the face and neck.<sup>37</sup> Still seated in the vehicle, Wilson responded by going for his firearm, and Brown went for it as well.<sup>38</sup>

Brown pushed the firearm against Officer Wilson’s hip but Wilson managed to point it at Brown’s hand, at which point, Wilson fired, striking Brown in the thumb and just missing Wilson’s own lap.<sup>39</sup>

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4, 2016, 10:24 PM), <http://www.nydailynews.com/news/politics/feds-case-cops-involved-eric-garner-death-article-1.2527515> [<https://perma.cc/K3NQ-RM5P>].

29. Dean Meminger, *Time Running out for Obama DOJ to Pursue Civil Rights Case in Death of Eric Garner*, NY1 (Jan. 9, 2017, 8:25 PM), <http://www.ny1.com/nyc/all-boroughs/criminal-justice/2017/01/9/time-running-out-for-obama-doj-to-pursue-civil-rights-case-in-death-of-eric-garner.html> [<https://perma.cc/3EFS-TGE7>].

30. Evan Perez & Shimon Prokupecz, *Feds at Odds Over Charges in Eric Garner Case*, CNN (June 2, 2016, 4:57 PM), <http://www.cnn.com/2016/06/02/politics/feds-eric-garner-charges-odds/> [<https://perma.cc/S46B-K27D>].

31. U.S. Department of Justice, *US Department of Justice report regarding the criminal investigation into the shooting death of Michael Brown by Ferguson, Missouri, Police Officer Darren Wilson* 6, (Mar. 4, 2015) [hereinafter DOJ].

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

Brown turned and ran down the street.<sup>40</sup> Officer Wilson got out of his vehicle and ran after Brown.<sup>41</sup> At about 180 feet down the street from the patrol vehicle, Brown stopped, turned, and came toward Officer Wilson with his hands at his sides.<sup>42</sup> Officer Wilson repeatedly ordered him to stop, yet Brown kept advancing.<sup>43</sup> Wilson shot Brown multiple times until Brown fell to the ground.<sup>44</sup>

In three separate torrents of fire including the one in the vehicle, Officer Wilson's shots met their mark six to eight times, the last finding Brown's head; Brown died in the street.<sup>45</sup>

In the aftermath of the shooting, concerned citizens marched in the streets, and on November 24, 2014, they returned to the streets—some violently—upon hearing the news that the grand jury, composed of nine white and three black jurors, did not indict Officer Wilson.<sup>46</sup> The District Attorney's office subsequently released *all* the grand jury materials to the public, which included all witness testimonies, audio, photos, and video transcripts.<sup>47</sup>

The U.S. Department of Justice completed a thorough eighty-six-page investigation into the shooting (including grand jury testimony, DNA/ballistics/fingerprint forensics, toxicology, and store video). This independent federal report concluded, “this matter lacks prosecutive merit and should be closed.”<sup>48</sup>

### C. Tamir Rice—Cleveland, Ohio

“I’m sitting in the park . . . [t]here’s a guy here with a pistol pointing it at everybody . . . . The guy keeps pulling it in and out of his pants, it’s probably fake but you know what, he’s scaring the shit out

40. *Id.*

41. *Id.* at 7.

42. *Id.* at 7–8.

43. *Id.* at 7, 13; Eyder Peralta & Krishnadev Calamur, *Ferguson Documents: How The Grand Jury Reached A Decision*, NPR (Nov. 25, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision> [https://perma.cc/H5DR-F2W6].

44. DOJ, *supra* note 31, at 7.

45. DOJ, *supra* note 31, at 7.

46. Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges For Officer In Michael Brown's Death*, NPR (Nov. 24, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case> [https://perma.cc/6NTW-TDB6]. It should be noted that Eric Garner's arrest in New York occurred just over three weeks earlier than Michael Brown's in Missouri, but the grand jury looking into Brown's death declined to indict first, by a mere nine days, before the grand jury declaration in New York.

47. *Id.* (emphasis added).

48. DOJ, *supra* note 31, at 86.

of people,” a 911 caller reported to Cleveland police on November 22, 2014.<sup>49</sup> The “guy” playing with the pistol was twelve-year-old Tamir Rice.<sup>50</sup> The pistol was an airsoft pellet gun that did not have an orange safety marker to show it was a fake firearm.<sup>51</sup> Rookie officer Timothy Loehmann and his training officer Frank Garmack headed to the scene after receiving the dispatch call, which omitted the information that the pistol was “probably fake.”<sup>52</sup>

Officers Loehmann and Garmack drove their patrol car through the park’s grass and right up to the gazebo where Rice was sitting alone.<sup>53</sup> Upon reaching the gazebo, Officer Loehmann yelled out from the car window three times for Rice to put his hands up.<sup>54</sup> Rice moved the pellet gun at his waist.<sup>55</sup> Officer Loehmann jumped out of the car and, two seconds later, shot Rice.<sup>56</sup> Rice died the next day from the gunshot wounds.<sup>57</sup>

On December 28, 2015, after completing its investigation, a grand jury declined to indict either officer with charges relating to Rice’s death.<sup>58</sup> Prosecutor Tim McGinty said, “Given this perfect storm of human error, mistakes and communications by all involved that day, the evidence did not indicate criminal conduct by police.”<sup>59</sup>

#### D. Walter Scott—Charleston, South Carolina

A routine traffic stop turned deadly, as Walter Scott was pulled over near a vacant lot in North Charleston, South Carolina on April 4, 2015, for a broken brake light.<sup>60</sup> Officer Michael Slager got out of his

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49. Tom McCarthy, *Tamir Rice: video shows boy, 12, shot ‘seconds’ after police confronted child*, THE GUARDIAN (Nov. 26, 2014), <http://www.theguardian.com/us-news/2014/nov/26/tamir-rice-video-shows-boy-shot-police-cleveland> [https://perma.cc/AR9J-2ANU].

50. *Id.*

51. Elahé Izadi & Peter Holley, *Video shows Cleveland officer shooting 12-year-old Tamir Rice within seconds*, WASHINGTON POST (Nov. 26, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/> [https://perma.cc/37S4-VS2S].

52. *Id.*

53. *Id.*

54. *Id.*

55. McCarthy, *supra* note 49.

56. *Id.*

57. *Id.*

58. Ashley Fantz, Steve Almasy, & Catherine E. Shoichet, *Tamir Rice shooting: No charges for officers*, CNN (Dec. 28, 2015), <http://www.cnn.com/2015/12/28/us/tamir-rice-shooting/> [https://perma.cc/PE46-7CBW].

59. *Id.*

60. Daniella Silva, *Walter Scott Shooting: Dash Cam Video From Traffic Stop Is Released*, NBC (Apr. 9, 2015), <http://www.nbcnews.com/storyline/walter-scott-shooting/dash-cam->

patrol car, walked up to Scott's driver's side window, and asked for Scott's license, insurance, and registration.<sup>61</sup> When Scott did not have the needed information, Officer Slager went back to his patrol car for a moment.<sup>62</sup> In the dash cam video, Scott is seen jumping out of the car and running away from the scene.<sup>63</sup> At that point, Officer Slager pursued Scott into the vacant lot.<sup>64</sup> A bystander in the adjacent lot caught the events that followed on cellphone video.<sup>65</sup> While the cellphone owner cursed in the background, the video captured Scott running through the park, a short physical exchange between Scott and Officer Slager where something fell to the ground (possibly Slager's taser) and Scott turned to run again.<sup>66</sup> As Scott ran away, the video showed Officer Slager drawing his firearm and firing eight shots, four or five of which hit Scott, killing him in minutes.<sup>67</sup> The video then showed Officer Slager retrieve whatever had fallen on the ground and drop it next to Scott's body, and later picking it up and placing it back in his belt.<sup>68</sup> In his initial comments regarding the altercation, Officer Slager claimed that Scott had taken his taser.<sup>69</sup>

Upon release of the cellphone video, Officer Slager was arrested for murder.<sup>70</sup> On June 8, 2015, after completing its investigation, a grand jury returned a murder indictment against Officer Slager for killing Walter Scott.<sup>71</sup>

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video-shows-walter-scott-fleeing-fatal-shooting-michael-n338786 [https://perma.cc/W6YW-QJ6W].

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Erik Ortiz, *Michael Slager Charged With Murder of Walter Scott in South Carolina*, NBC (Apr. 8, 2015), <http://www.nbcnews.com/storyline/walter-scott-shooting/michael-slager-south-carolina-officer-charged-murder-black-man-n337526> [https://perma.cc/3LRU-9P5E].

68. Silva, *supra* note 60.

69. *Id.*

70. *Id.*

71. Erin McClam, *Walter Scott Shooting: Grand Jury Returns Murder Indictment Against Cop*, NBC (June 8, 2015), <http://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-grand-jury-returns-murder-indictment-against-cop-n371626> [https://perma.cc/HW9A-J7XA]. In December, 2016, a trial jury hung on the case (but there will be a retrial in the future). See Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html> [https://perma.cc/JV5U-UUWF].

### E. Freddie Gray—Baltimore, Maryland

The events leading up to the death of Freddie Gray are highly disputed and are currently being examined in court.<sup>72</sup> On April 12, 2015, Gray was chatting with a friend in a west Baltimore neighborhood known for drug dealing when he spotted bicycle police, and thereafter fled.<sup>73</sup> There was a short chase by two bicycle officers and a third officer on foot.<sup>74</sup> Less than three minutes later, the officers apprehended Gray and arrested him for possessing an illegal switchblade knife.<sup>75</sup> The officers then requested a transport van to take Gray to where he would be booked.<sup>76</sup> At that point, Gray requested an inhaler for his asthma but was not given one until much later.<sup>77</sup> Then, the officers placed him in the van with handcuffs on.<sup>78</sup> About four minutes later, the officers stopped the van because Gray was acting “irate.”<sup>79</sup> There, his metal handcuffs were replaced with plastic ones and he was also put in leg shackles; he was placed back in the van but the officers did not secure him in a seat belt.<sup>80</sup>

Before transporting Gray to booking, the officers were called to pick up another arrestee near where the initial chase began.<sup>81</sup> This person was placed in a separated holding area in the van and had no contact with Gray.<sup>82</sup> About forty minutes after the initial chase began, the officers arrived at the police station; upon removing Gray from the van, the officers found him non-responsive and not breathing.<sup>83</sup> Paramedics responded and treated Gray at the station for about twenty minutes and then he was taken to Maryland Shock Trauma Center where he went into a coma and then died on April 19, 2015.<sup>84</sup>

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72. Justin Fenton & Kevin Rector, *Freddie Gray case: Officer Miller takes stand in Nero trial, state rests*, BALTIMORE SUN (May 16, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-nero-trial-day3-20160516-story.html> [https://perma.cc/6XYR-BC2M].

73. Kevin Rector, *The 45-minute mystery of Freddie Gray's death*, THE BALTIMORE SUN (Apr. 25, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-gray-ticker-20150425-story.html> [https://perma.cc/7VNK-6P48].

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*; see also Fenton & Rector, *supra* note 72 (describing that Gray was placed in plastic handcuffs).

81. Rector, *supra* note 73.

82. *Id.*

83. *Id.*

84. *Id.*

The medical examiner's report concluded that Gray suffered a partial fracture of his cervical spinal cord and no other injuries or broken limbs.<sup>85</sup>

Six police officers were suspended as a result of the incident: Brian Rice, Alicia White, William Porter, Garrett Miller, Edward Nero, and Caesar Goodson Jr.<sup>86</sup> On May 21, 2015, a Baltimore grand jury indicted *all six* officers.<sup>87</sup> The indicted charges ranged from assault to homicide.<sup>88</sup> The driver of the van, Officer Goodson, was indicted with a second-degree murder charge.<sup>89</sup> Officers Goodson, Porter, Rice, and White were indicted on manslaughter charges.<sup>90</sup> All six officers were indicted on second-degree assault, reckless endangerment, and misconduct in office charges.<sup>91</sup> Additionally, the U.S. Department of Justice opened a civil rights investigation into the entire Baltimore Police Department.<sup>92</sup>

In December 2015, Officer Porter's first trial resulted in a hung jury.<sup>93</sup> Officer Edward Nero was then tried for his participation in the arrest; the prosecutor contended that Nero put Gray at risk when he placed him in the arrest van without a seat belt.<sup>94</sup> After three trials and three acquittals for officers who had custody of Freddie Gray when he was injured, Baltimore State Attorney, Marilyn Mosby, dropped all charges for the remaining three officers involved.<sup>95</sup> In her statement regarding her decision on July 27, 2016, she explained, "We could try this case 100 times, and cases just like it, and we would still end up

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85. *Id.*

86. *Id.*

87. Richard Perez-Pena, *Six Baltimore Officers Indicted in Death of Freddie Gray*, N.Y. TIMES (May 21, 2015), <http://www.nytimes.com/2015/05/22/us/six-baltimore-officers-indicted-in-death-of-freddie-gray.html> (emphasis added) [<https://perma.cc/K3J5-5XMG>].

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Justin Fenton & Kevin Rector, *Mistrial declared in trial of Officer William Porter in death of Freddie Gray*, THE BALTIMORE SUN (Dec. 16, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-porter-trial-jury-wednesday-20151216-story.html> [<https://perma.cc/8MS7-TE3F>].

94. Fenton & Rector, *supra* note 72.

95. Carolyn Sung & Catherine E. Shoichet, *Freddie Gray case: Charges dropped against remaining officers*, CNN (June 27, 2016), <http://www.cnn.com/2016/07/27/us/freddie-gray-verdict-baltimore-officers/> [<https://perma.cc/DQ8N-L53B>]; Guerin Hays, Leland Vittert, & The Associated Press, *All charges dropped in Freddie Gray case; no convictions*, FOX NEWS (July 27, 2016), <http://www.foxnews.com/us/2016/07/27/all-charges-dropped-in-freddie-gray-case-no-convictions.html> [<https://perma.cc/F4RQ-43AF>].

with the same result . . . [the case showed] an inherent bias that is a direct result of when police police themselves.”<sup>96</sup>

#### F. Mario Woods—San Francisco, California

A stab victim reached the San Francisco General Hospital on December 2, 2015 to report that he was attacked at Third Street and Le Conte, and that the suspect was still at large.<sup>97</sup> Six blocks away, police officers found a man who matched the suspect’s description, Mario Woods.<sup>98</sup> Woods was still armed with a knife, possibly the same one used in the stabbing.<sup>99</sup>

Police officers ordered Woods to drop the knife; they used pepper-spray and high velocity beanbag ammunition to attempt his submission, but he refused to surrender.<sup>100</sup> Leaning up against a wall, Woods moved toward an officer, which caused five officers to fire their weapons.<sup>101</sup> Woods was shot fifteen times.<sup>102</sup> By the time the shooting occurred, there were at least ten police officers at the scene.<sup>103</sup> Multiple cellphone videos captured the incident and were subsequently posted online.<sup>104</sup>

Mario Woods was a reported gang member in the Oakdale Mob who participated in armed robbery and automobile theft, caused a car accident while fleeing from police by vehicle, and had been convicted of possession of a firearm by a felon.<sup>105</sup> He had been in and out of incarceration for much of his life.<sup>106</sup> The toxicology report showed that, at the time of his death, Woods had methamphetamine, marijuana, cough medicine, and antidepressants in his system.<sup>107</sup>

In February 2016, the U.S. Department of Justice began an investigation into the possible use of excessive force by police during this

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96. Sung & Shoichet, *supra* note 95.

97. Chris Roberts & Julia Carrie Wong, *UPDATED: Mario Woods, Gang Member Slain by SFPD, Remembered as “Total Sweetheart”*, SF WEEKLY (Dec. 3, 2015), <http://www.sfweekly.com/thesnitch/2015/12/03/man-shot-by-sfpd-idd-as-mario-woods-was-on-gang-injunction> [<https://perma.cc/4DZT-HGCX>].

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See Vivian Ho & Demian Bulwa, *S.F. city attorney: Police lawfully killed Mario Woods*, SAN FRANCISCO CHRONICLE (Oct. 23, 2016), <http://www.sfgate.com/bayarea/article/San-Francisco-city-attorney-Police-lawfully-6827312.php> [<https://perma.cc/GTQ4-THX6>].

incident.<sup>108</sup> Loretta Lynch, the Attorney General, explained they would be examining the police department's "current operational policies, training practices, and accountability systems" to identify areas of improvement.<sup>109</sup> The officers involved in the shooting were placed on administrative duty pending the outcome of the federal and San Francisco Police Department Internal Affairs investigations.<sup>110</sup>

The San Francisco City Attorney's office also conducted an investigation in response to a lawsuit from Woods' family.<sup>111</sup> On February 13, 2016, that office released a statement saying that because Woods refused to drop the knife, he posed an imminent threat to bystanders and officers.<sup>112</sup> By repeatedly refusing to disarm himself and then attempting to flee toward an officer and a group of onlookers, the officers' escalation from pepper spray to beanbag ammunition to actual ammunition was deemed justified.<sup>113</sup> That police fatal force incident ultimately became one of the key reasons the San Francisco mayor demanded, and subsequently received, the resignation of Chief of Police Greg Suhr on May 19, 2016.<sup>114</sup>

## II. A Tale of Two States' Responses

### A. The New York Governor Tells the Attorney General to Investigate First

Less than a week after the Staten Island grand jury failed to indict in the Eric Garner case, New York State Attorney General Eric T. Schneiderman asked New York Governor Andrew Cuomo to immediately grant his office the power to investigate and prosecute killings of unarmed civilians by law enforcement officials.<sup>115</sup> His proposal re-

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108. AFP & Jessica Chia, *Justice Department reviewing San Francisco police's use of excessive force after black man was killed in a hail of police bullets*, DAILY MAIL (Feb. 1, 2016), <http://www.dailymail.co.uk/news/article-3427311/US-Justice-Department-investigate-San-Francisco-police.html> [https://perma.cc/2YLY-PNW2].

109. *Id.*

110. *Id.*

111. See Ho & Bulwa, *supra* note 107.

112. *Id.*

113. *Id.*

114. Emily Green, Bob Egelko, Jenna Lyons, & Erin Allday, *SFPD Chief Greg Suhr resigns after police killing of woman*, SAN FRANCISCO CHRONICLE (May 19, 2016), <http://www.sfgate.com/bayarea/article/Police-Chief-Greg-Suhr-resigns-after-killing-of-7758122.php> [https://perma.cc/Y336-UQX5].

115. Jesse McKinley & J. David Goodman, *New York Attorney General Seeks Powers to Investigate Killings by the Police*, N.Y. TIMES (Dec. 8, 2014), [http://www.nytimes.com/2014/12/09/nyregion/new-york-attorney-general-seeks-powers-to-investigate-killings-by-the-police.html?\\_r=0](http://www.nytimes.com/2014/12/09/nyregion/new-york-attorney-general-seeks-powers-to-investigate-killings-by-the-police.html?_r=0) [https://perma.cc/C8B5-7YPJ].

ceived swift pushback from both police unions and several local district attorneys in New York City.<sup>116</sup> Governor Cuomo then announced in July 2015, nearly a year after Garner's death, that he would issue an executive order naming the state attorney general as a special prosecutor for police-related civilian deaths: "A criminal justice system doesn't work without trust," noted Governor Cuomo, "We will be the first state in the country to acknowledge the problem and say we're going to create an independent prosecutor who does not have that kind of connection with the organized police departments."<sup>117</sup> Executive Order 147 was issued July 8, 2015, and provided in part:

“. . . WHEREAS, there have been recent incidents involving the deaths of unarmed civilians that have challenged the public's confidence and trust in our system of criminal justice; and

WHEREAS, public concerns have been raised that such incidents cannot be prosecuted at the local level without conflict or bias, or the public perception of conflict or bias; and

WHEREAS, it is necessary to ensure that a full, reasoned, and independent investigation and prosecution of any such incident is conducted without conflict or bias, or the perception of conflict or bias; and

WHEREAS, the foregoing compels me to conclude that my constitutional obligations provide that in cases where an issue of a real or perceived conflict of interest exists, and to ensure full confidence in our system of criminal justice, a special prosecutor should be appointed with respect to such incidents. Such appointment of a special prosecutor will supersede in all ways the authority and jurisdiction of a county district attorney to manage, interpret, prosecute or inquire about such incidents; and

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, and particularly by subdivision 2 of section 63 of the Executive Law, hereby require the Attorney General (hereinafter, the "special prosecutor") to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer, as listed in subdivision 34 of section 1.20 of the Criminal Procedure Law. The special prosecutor may also investigate and prosecute in such instances where, in his opinion, there is a significant question as to whether the civilian was armed and dangerous at the time of his or her death;

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116. *Id.*

117. Noah Remnick, *Cuomo to Appoint Special Prosecutor for Killings by Police*, N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html> [<https://perma.cc/92F9-MSML>].

FURTHER, for any matter covered herein, the special prosecutor shall have the powers and duties specified in subdivisions 2 and 8 of section 63 of the Executive Law for purposes of this Order, and shall possess and exercise all the prosecutorial powers necessary to investigate, and if warranted, prosecute the incident. The special prosecutor's jurisdiction will displace and supersede the jurisdiction of the county district attorney where the incident occurred; and such county district attorney shall have only the powers and duties designated to him or her by the special prosecutor as specified in subdivision 2 of section 63 of the Executive Law. . . ."<sup>118</sup>

Attorney General Schneiderman then began to utilize the order, but not without some local defiance. When the District Attorney of upstate Rensselaer County ignored the order in an April 2016 police shooting and took the case to a grand jury within a week (who declined to indict), Schneiderman asserted himself by suing the local prosecutor, asking a court to remove him from the case, and claiming the grand jury was invalid for lack of local jurisdiction under the executive order giving the Attorney General first review (which it had in fact been reviewing).<sup>119</sup>

## B. The California Response

In California, the state's then-chief law enforcement officer, Attorney General Kamala D. Harris, saw the situation differently. She noted in a December 22, 2014 interview with the San Francisco Chronicle that the California state system has built-in safeguards: locally elected prosecutors are accountable to their communities and the state attorney general has power to take over any case involving a conflict of interest or local prosecutor not following the law.<sup>120</sup>

"I don't think it would be good public policy to take the discretion from elected district attorneys," Harris noted (herself a former District Attorney in San Francisco); "I don't think there's an inherent conflict. . . . Where there are abuses, we have designed the system to address them. . . . [I]f I decided that there was a case where there was a local prosecutor who was breaking the law, who was

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118. *Governor Cuomo Signs Executive Order Appointing NYS Attorney General as Special Prosecutor in Cases Where Law Enforcement Officers Are Involved in Deaths of Civilians*, N.Y. STATE (July 8, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-appointing-nys-attorney-general-special-prosecutor-cases> [<https://perma.cc/8U3P-3LNA>].

119. Editorial Bd., *Upstate New York's Defiant District Attorney*, N.Y. TIMES (May 2, 2016), <http://nytimes.com/2016/05/03/opinion/upstate-new-yorks-defiant-district-attorney.html> [<https://perma.cc/BQW3-6G7S>].

120. Bob Egelko, *Kamala Harris sees safeguards in D.A.s prosecuting police killings*, SAN FRANCISCO CHRONICLE (Dec. 22, 2014), <http://www.sfgate.com/news/article/Kamala-Harris-sees-safeguards-in-D-A-s-5972586.php> [<https://perma.cc/Y4Q8-FQRL>].

committing prosecutorial misconduct, we would come in and take the case.”<sup>121</sup>

However, California’s legislative branch had other ideas, principal among them was SB 227, proposed in early 2015. The same San Francisco Chronicle article interviewing Attorney General Harris also spoke to LaDoris Cordell, a former Santa Clara Judge who later served as San Jose’s independent police auditor.<sup>122</sup> In Cordell’s opinion, “The decision about whether to prosecute police officers should be taken away from prosecutors who work hand in hand, on a daily basis, with police officers.”<sup>123</sup> Cordell would become an important figure in the legislative history of SB 227.

Senate Bill 227 proposed to add the following to California Penal Code section 917:

[T]he grand jury shall not inquire into an offense that involves a shooting or use of excessive force by a peace officer described in Section 830.1, subdivision (a) of Section 830.2, or Section 830.39, that led to the death of a person being detained or arrested by the peace officer pursuant to Section 836.<sup>124</sup>

This new law would effectively remove any peace officer fatal force case from the grand jury’s jurisdiction, allowing only charges by the relevant government prosecutor (filing a criminal complaint) followed by preliminary examination.

At the April 21, 2015 California Senate Public Safety Committee meeting to consider SB 227, Judge Cordell’s ultimate question, “Should grand juries be abolished?” was cited in the bill’s legislative history.<sup>125</sup> In reference to Eric Garner and Michael Brown, it concluded, “[I]f we abolish criminal grand juries, at least their deaths will not have been in vain.”<sup>126</sup> The Committee’s report further explained that the Legislators wanted more transparency in the system, which had historically been closed to the public.<sup>127</sup> They were upset that the grand jury system was not adversarial—that there were no defense attorneys involved to cross examine or make objections.<sup>128</sup> Another complaint was that the judge was not present and only the prosecutor

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121. *Id.* The article notes that the AG taking over a local case under such circumstances had not happened since Harris took state office in 2011.

122. *Id.*

123. *Id.*

124. CAL. PENAL CODE § 917 (West 1996).

125. Senate Committee on Public Safety, Bill Analysis on SB 227, 4/21/2015, at 3–5.

126. *Id.* at 3–5.

127. *Id.* at 4.

128. *Id.* at 3.

was allowed to explain the law.<sup>129</sup> Indeed, the California State Conference of the NAACP noted in its support of the bill cited in the legislative history,

Ultimately, the convening of the grand juries in these cases has provided no justice for the deaths of Eric Garner and Michael Brown. . . . If [local prosecutors] do not choose to file charges against the officers [in deadly force cases] they risk the disapproval and criticism of the community. Conversely, if the local prosecutor does decide to press charges, they jeopardize their relationship with law enforcement and their unions. The option to proceed with a criminal grand jury exonerates the prosecutor of their duties and allows them to use the grand jury as a pawn for political cover.<sup>130</sup>

Most importantly, California legislators that favored SB 227 wanted justice for Eric Garner and Michael Brown, as seen by this theme's repeated use in the April 21st Senate Public Safety analysis, the May 5th Senate Floor analysis, the May 6th Senate Floor analysis, and the June 15th Assembly Public Safety analysis.<sup>131</sup> The Friends Committee on Legislation of California is cited in the legislative history for the comment, "The failure to hold anyone accountable [in the Garner and Brown cases] undermines public respect for the law."<sup>132</sup> The longest argument in support of the bill came from Judge Cordell's editorial which not only called for the total abolishment of the California indictment grand jury, but also argued why the preliminary examination method of charging (involving public hearings, defense attorneys, and judges) is far superior.<sup>133</sup>

The California District Attorneys Association ("CDA") argued against the bill, explaining to the legislators that California's grand jury system is fairer than any other, including the federal system.<sup>134</sup> Penal Code section 939.6 further requires that all testimony must be sworn, and only evidence that is admissible over objection in a criminal trial may be received in such formal investigations; thus, the rules

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129. *Id.*

130. *S.B. 277 Bill Analysis: Third Reading*, LEGISLATIVE INFO CALIFORNIA (Apr. 21, 2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0201-0250/sb\\_227\\_cfa\\_20150504\\_111553\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_227_cfa_20150504_111553_sen_floor.html) [https://perma.cc/LT4B-DNW4].

131. *Id.*

132. *S.B. 227 Bill Analysis: Assembly Committee on Public Safety*, LEGISLATIVE INFO CALIFORNIA (June 16, 2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0201-0250/sb\\_227\\_cfa\\_20150615\\_102234\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_227_cfa_20150615_102234_asm_comm.html) [https://perma.cc/5P34-NZ7X].

133. *S.B. 227 Bill Analysis: Senate Committee on Public Safety*, LEGISLATIVE INFO CALIFORNIA (Apr. 21, 2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0201-0250/sb\\_227\\_cfa\\_20150420\\_110925\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_227_cfa_20150420_110925_sen_comm.html) [https://perma.cc/GTU5-4DNY].

134. *Grand Juries: Powers and Duties: Third Reading on S.B. 227 before S. Comm. On Public Safety* 3 (Cal. 2015).

of evidence are indeed used during grand jury investigations.<sup>135</sup> Also, prosecutors are required to present exculpatory evidence or suffer dismissal of the trial under Penal Code section 939.71.<sup>136</sup> Additionally, the CDAA explained that if an individual is indicted, the grand jury investigation transcripts would be released to both the defense attorney and the prosecutor, as well as the public under Penal Code section 938.1.<sup>137</sup> Moreover, the CDAA suggested that the Legislature could modify section 938.1 of the Penal Code to include public release of the transcript for non-indicted peace officer fatal force cases, so as to increase transparency without removing the cases from the grand jury altogether.<sup>138</sup> Notwithstanding the CDAA objections, SB 227 passed both houses of the California Legislature and was signed by the Governor, Edmund J. Brown Jr., on August 11, 2015.<sup>139</sup> It became effective January 1, 2016.

### III. Logical & Ethical Problems With This New Statutory Grand Jury Band, and a Test Case Emerges

The reasoning behind the removal of peace officer fatal force cases from the grand jury's purview may have been with the best intentions, but it resulted in unintended and ironic consequences. Bringing justice to those deserving may be harder now than it was before SB 227 because the grand jury has lost its power to hear these peace officer fatal force cases as a *pre-charging* investigative tool of the prosecution. Prosecutors are forced to directly file complaints on only the strongest cases or internally decline to file.

The ethical rules of charging, as well as the timing of the two major routes of felony charging mechanisms (indictment vs. complaint/preliminary examination/information) must first be understood. The minimum standard to file charges in the state of California rests on the following four requirements:

- [1] There has been a complete investigation and thorough consideration of all pertinent data; [2] There is legally sufficient, admissi-

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135. *Grand Juries: Powers and Duties: Hearing on S.B. 227 before S. Comm. On Pub. Safety* 5 (Cal. 2015) (quoting Office of the Attorney General of the State of California, No. 83-903, 67 Ops. Cal. Atty. Gen. 58).

136. Senate Committee, *supra* note 125, at 4.

137. *Id.* at 4.

138. *Id.*

139. S.B. 227 passed by a 23-12 vote in the Senate and a 41-33 vote in the Assembly. See *S.B. 227 Unofficial Ballot*, LEGISLATIVE INFO CALIFORNIA (July 16, 2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0201-0250/sb\\_227\\_vote\\_20150716\\_1012AM\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_227_vote_20150716_1012AM_asm_floor.html) [https://perma.cc/A7MX-SS5P].

ble evidence of a corpus delicti; [3] There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime; and [4]The prosecutor has considered the probability of conviction by an objective factfinder hearing the admissible evidence.<sup>140</sup>

In other words, for prosecutors to ethically file charges, they must first believe they possess sufficient evidence to convict a defendant, that being proof beyond a reasonable doubt. Even California Rules of Professional Conduct Rule 5-110 requires prosecutors not to file criminal charges without a belief that such charges are supported by probable cause.<sup>141</sup> A preliminary examination, such as favored by Judge Cordell and the California Legislature, is indeed a mechanism to test probable cause, and the magistrate presiding must dismiss the complaint if "it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant is guilty of a public offense."<sup>142</sup> A prosecutor may not simply file a criminal complaint and conduct a preliminary examination hoping sufficient evidence will be developed to possibly lead the magistrate to find probable cause. A preliminary examination is not an investigatory body the way a grand jury is; the simple chronological fact that a grand jury is a pre-charging tool, while the preliminary examination is post-charging, makes all the difference.

A case with strong evidence to establish that a peace officer shot an unarmed, fleeing, traffic-stop suspect in the back, then attempted to plant or hide evidence (as appears to have occurred in Charleston, South Carolina in the independent witness' cell phone video) is clear enough to file directly by complaint and set for preliminary examination. While such cell phone videos are becoming more common, they are still the exception. Because the weaker or more equivocal cases cannot ethically be filed just to be tested at the preliminary examination, and can no longer be taken to the grand jury because of SB 227, the net result of the new law may well be *fewer* peace officer fatal force cases filed and more officers who use fatal force *not* facing public justice in court, contrary to apparent legislative intent. Moreover, with these more equivocal cases being handled internally by district attorneys' offices, leading them to decline to file charges with the issuance

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140. The Ethics Comm. and Civil Liab. Principles for Prosecutors & Brian E. Michaels, ed., *Professionalism: A Sourcebook Of Ethics and Civil Liability Principles for Prosecutors*, XXVII PROSECUTOR'S NOTEBOOK III-18 (2001).

141. See RULES PROF'L CONDUCT, r. 5.110 (STATE BAR OF CAL.) ("A member in government service shall not institute or cause to be instituted charges when the member knows or should know that the charges are not supported by probable cause.").

142. CAL. PENAL CODE § 871 (2016).

merely of whatever report may be politically feasible in each jurisdiction, the entire process thus becomes *less*, not more, transparent—the exact opposite of what the Legislature wanted when enacting SB 227.

California prosecutors may have lost the battle in the Legislature, now that SB 227 has passed and with Penal Code section 917(b) codified, but that result did not preclude them from testing the new law in the courts once they found an appropriate test case. Just as SB 227 was moving swiftly through the Legislature, a case was beginning in El Dorado County. Police received a call of a female screaming and crying at an inn in South Lake Tahoe and dispatched two officers to respond.<sup>143</sup> Two minutes after arrival, one of the officers radioed that a man was fleeing through an open window.<sup>144</sup> Seconds later, the officer, Joshua Klinge, shot the man.<sup>145</sup> That man, twenty-two-year-old Kris Jackson, died in the hospital two hours later.<sup>146</sup>

Unable to independently charge the officer with any crimes due to the lack of definitive evidence, but unwilling to simply sweep the matter under the rug by internally closing the case, the El Dorado District Attorney's office, in early January 2016, subpoenaed Officer Klinge and other peace officer witnesses to testify to a duly-empaneled grand jury to further investigate the incident. Instead of obeying their subpoenas and being compelled to testify, the officers, through their union attorneys, filed a motion to quash the subpoena, citing the new Penal Code section 917(b). The motion to quash argued to the Honorable Superior Court Judge James R. Wagner that, because the grand jury was no longer allowed to hear peace officer fatal force cases under the new penal code legislation, the subpoena was improper and should be quashed. The prosecution argued that the new statute was unconstitutional on multiple grounds.<sup>147</sup> The judge ultimately declined to force the officers to testify on their accounts of the incident, reluctantly ruling that he would not find the new law unconstitutional.<sup>148</sup>

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143. Bill Lindelof, *Timeline of police shooting of unarmed man in South Lake Tahoe*, SACRAMENTO BEE (July 17, 2015), <http://www.sacbee.com/news/local/crime/article24714634.html> [<https://perma.cc/ALX9-W3GN>].

144. *Id.*

145. *Id.*; Isaac Brambila, *Name of shooting officer in Jackson case released*, TAHOE DAILY TRIBUNE (July 14, 2015), <http://www.tahodailytribune.com/news/17263684-113/name-of-shooting-officer-in-jackson-case-released> [<https://perma.cc/AH2A-VE36>].

146. Lindelof, *supra* note 143.

147. *See infra* Part IV.

148. A transcript of that hearing filed with the later appellate writ quotes Judge Wagner, speaking to the prosecutor, "While I will say it was a very well put together argument, and I'll say a very cogent argument, and very—tempting is not the word—I can't find the

El Dorado County District Attorney then sought writ relief in the third District Court of Appeals (“DCA”), claiming the new law was an unconstitutional usurpation of the grand jury’s independent constitutionally-created jurisdiction, as well as a legislative violation of the Executive’s power to choose between equal constitutional charging tools: grand jury or preliminary examination.<sup>149</sup> The CDAA, Riverside County District Attorney, Sacramento County District Attorney, Yolo County District Attorney, and Ventura County District Attorney filed amicus briefs and letters in support of El Dorado County District Attorney’s writ request. On April 22, 2016, the third DCA issued an order to show cause, ordering respondents and real parties in interest (“RPIs”), to show cause why petitioner El Dorado County District Attorney’s request for relief should not be granted. RPIs filed their return on May 23, 2016 and the issue was thus legally joined.<sup>150</sup>

#### **IV. Legal Reasons Why SB 227 Is Unconstitutional, as Presented in the El Dorado Test Case**

##### **A. Introduction**

As of January 1, 2016, SB 227 enacted Penal Code section 917(b). This change resulted in the removal of peace officer fatal force cases from the jurisdiction of the criminal grand jury in California:

[T]he grand jury shall not inquire into an offense that involves a shooting or use of excessive force by a peace officer described in Section 830.1, subdivision (a) of Section 830.2, or Section 830.39, that led to the death of a person being detained or arrested by the peace officer pursuant to Section 836.<sup>151</sup>

The California Legislature has never before removed any class of offenses from the criminal grand jury’s consideration. To be specific, this is the first time in 166 years (since Statehood) that any type of felony has been kept from the criminal grand jury’s ability to charge through indictment, thereby restricting the District Attorney’s authority to charge through complaint, preliminary examination, and information only.

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word I’m trying to find, but I would respectfully decline to declare this legislation unconstitutional.” Motion to Compel Witness at 4, Grand Jury Investigation for El Dorado County P16CRF0064, (2016), on file with author.

149. Petition for Writ of Mandate, California vs. Super. Ct. of El Dorado Cty., 7 Cal.App.5th 402 (2016) (No. P16CRF0064).

150. The Third DCA ordered the case set for oral argument in an unusual public forum, University of California, Davis, School of Law, on October 26, 2016. The DCA opinion was issued on January 10, 2017, as this article was being edited; *see infra* Part VI.

151. CAL. PENAL CODE § 917 (1996).

With origins in common law, the criminal grand jury and its indictment power for felony crimes was written into the California Constitution at the first Constitutional Convention in 1849; subsequently, after the constitutional addition of the information in 1879, the indictment remained as an alternative charging option. Before this addition, charging was performed solely through the criminal grand jury.<sup>152</sup> The criminal grand jury is *constitutionally provided for*, meaning it was written into the Constitution. Thus, the power of the criminal grand jury is specifically enacted by the Constitution. Such a constitutional origin of power means that the only way to change or remove the power given to the criminal grand jury by the Constitution is to change the Constitution itself.<sup>153</sup> The Constitution can only be amended by a vote of the people, through either a ballot initiative,<sup>154</sup> or the passage of legislation by a two-thirds vote in both houses to place the issue on the ballot.<sup>155</sup> Here, neither was done. Instead, the Legislature itself amended the Penal Code in 2015 to take away the power (over certain crimes) guaranteed to the criminal grand jury by the state Constitution.

In addition to the protections afforded by the constitutional amendment process, case law has proven that any changes made to the criminal grand jury system by the legislature through processes other than constitutional amendment must be procedural only, not substantive.<sup>156</sup> A procedural change is distinct from a substantive change in that it does not affect the power of the criminal grand jury to inquire into certain types of felonies. Thus, removing any felony—in this case of SB 227, peace officer fatal force cases—is a substantive change to the criminal grand jury system that is, in a word, unconstitutional.

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152. Indeed, the grand jury has existed as a formal institution for centuries. *See, e.g., Johnson v. Superior Court*, 15 Cal. 3d 248, 257 (1975) (Mosk concurring).

153. *See, e.g., Fitts v. Superior Court of Los Angeles County*, 6 Cal. 2d 230, 241 (1936); *see also* discussion *infra* Section IV.B.

154. CAL. CONST. art. II, §8.

155. CAL. CONST. art. XVIII, §1.

156. *See* discussion, *infra* Sections IV.B.3 and 4.

## **B. The California Legislature Can Make Procedural but Not Substantive Changes to the Criminal Grand Jury**

### **1. The Criminal Grand Jury Originated in Common Law and Is Constitutionally Recognized and *Provided For***

Prior to adopting the first California Constitution in 1849, the criminal grand jury was a common law institution.<sup>157</sup> Upon the adoption of the Constitution of 1849, the criminal grand jury was first *provided for*: “No person shall be held to answer for a capital or other infamous crime<sup>158</sup> . . . unless on presentment or indictment of a grand jury.”<sup>159</sup> Because the criminal grand jury was rooted in common law, “[t]he members of the first constitutional convention in providing for a grand jury must have had in mind the grand jury as known to the common law.”<sup>160</sup>

Then, the Constitution was amended at the last Constitutional Convention of 1879 to add an alternative method for charging felonies by information following preliminary examination: “The later Constitution [of 1879] provided for the prosecution of criminal actions, either by information after examination and commitment by a magistrate, or by indictment with or without examination.”<sup>161</sup>

The Convention of 1879, like the Convention of 1849, left all questions affecting the grand jury not expressly covered by the Constitution to the Legislature by failing to make further provisions as to the grand jury. The Constitution of 1879 did not attempt to change the historic character of the grand jury, and the system its members had in mind was evidently the same system that had come down to them from common law.<sup>162</sup>

Thus, the criminal grand jury retained its common law origin as empowered by the Constitution.

### **2. Substantive Changes to the Criminal Grand Jury System Are Unconstitutional Following Constitutional Recognition**

The Court in *Fitts* further explained the above constitutional change as limited in scope:

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157. *Fitts*, 6 Cal.2d at 240.

158. “Infamous” crimes are felonies. *In re Westenberg* 167 Cal. 309, 319 (1914).

159. *Fitts*, 6 Cal. 2d at 240, citing CAL. CONST. of 1849 art. I § 8 (now found in CAL. CONST. art. I, § 14).

160. *Id.*

161. *Id.* at 241, CAL. CONST. of 1849 art. I § 8 (now found in CAL. CONST. art. I, § 14).

162. *Id.*

Practically the only change made by the Constitution of 1879 was to provide an additional system of prosecution for the higher grade of crimes, when before all such crimes were to be prosecuted by indictment of the grand jury. No change whatever was made in the grand jury system as such. *The Legislature was given no additional powers over the grand jury than those it had under the Constitution of 1849.*<sup>163</sup>

This change gave the Executive—the District Attorney—an alternative method for charging felonies other than indictment by the criminal grand jury: “[T]he prosecuting attorney is free in his completely unfettered discretion to choose which defendants will be charged by indictment rather than information. . . .”<sup>164</sup> Thus, the decision to use indictment or the new method of information was left to the Executive.<sup>165</sup>

In addition to the change’s limit in scope, the Court in *Fitts* reasoned that because the constitutional conventions in both 1849 and 1879 did not mention anything more regarding how the criminal grand jury system should operate, all further issues were left to the Legislature, which the Constitution reads, “as prescribed by law.”<sup>166</sup> This is where the substantive and procedural distinction originates—the power of the criminal grand jury to charge was expressly provided for by the Constitution, which is the substance of the criminal grand jury. On the other hand, how this process was to take place was not explained, except for its reliance upon the Legislature to *prescribe*.<sup>167</sup> The power given to the Legislature was to regulate the criminal grand jury’s procedure allowing it to function. Accordingly, *Fitts* concludes that any criminal grand jury questions not expressly covered in the Constitution are left to the Legislature, and because the power to charge felonies by indictment is expressly stated, it is not left to the Legislature to remove such power.<sup>168</sup>

Thus, the Legislature may make procedural changes to the criminal grand jury but *may not make substantive changes*, which are at issue here: its ability to charge certain felonies. Such a “prescription by law” that abrogates a power originating in the Constitution is thus unconstitutional.

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163. *Id.* (emphasis added).

164. *Hawkins v. Superior Court*, 22 Cal.3d 584, 594 (1978).

165. *See also*, *People v. Carlton*, 57 Cal. 559, 561–562 (1881).

166. *Fitts*, 6 Cal.2d at 241; CA CONST. art. 1, § 8.

167. *People v. Bird*, 212 Cal. 632, 637 (1931).

168. *Fitts*, 6 Cal.2d at 241.

### 3. Removing Any Felony From the Criminal Grand Jury Is a Substantive Change and Thus Cannot Be Done Without Constitutional Amendment

*People v. Lensen* determined whether an indictment was valid only when eleven male grand jurors returned a decision to indict (eight female grand jurors voted to indict as well).<sup>169</sup> Prior to *Lensen*, only the male votes counted because the grand jury was defined as “a body of *men*.”<sup>170</sup> In 1917, just before the *Lensen* decision, the Legislature passed a statute that allowed women to be valid grand jurors.<sup>171</sup> The court said, “The question has been removed from the field of controversy by the recent statute” prescribing women as competent grand jurors.<sup>172</sup> Consequently, the *Lensen* court deferred to the Legislature to answer the procedural questions of what the gender and number of jurors should be in a grand jury.<sup>173</sup>

In *People v. Bird*, the prosecutor filed an information charging the defendant for murder, but the magistrate held that the defendant should only be held to answer for manslaughter.<sup>174</sup> Thus the court considered whether the prosecutor could file an information for a different charge from the one which the defendant was held to answer.<sup>175</sup> In doing so, the court discussed the Legislature’s power provided by the Constitution:

There is nothing in the constitutional section which would compel or authorize a contrary conclusion, and there would appear to be every reason why the Legislature should be free to provide *procedure* consistent with constitutional requirements applicable both to indictment and information. With or without these words, the constitutional section is not self-executing as to the *procedure to be followed* by either method in bringing the accused to trial.<sup>176</sup>

The *procedure* discussed in *Bird* was *the use* of either an indictment or information to bring an accused to trial. Thus, the Legislature had the right to regulate how indictments and informations were brought and handled, but could not regulate *the underlying substance* of those indictments and informations because that was the very power to investigate felony charges by the grand jury and the prosecution.<sup>177</sup>

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169. *People v. Lensen*, 34 Cal.App. 336 (3d Dist. 1917).

170. *Id.* at 336 (emphasis added).

171. *Id.* at 339–40.

172. *Id.* at 340.

173. *Id.*

174. *Bird*, 212 Cal. at 632.

175. *Id.* at 638–9.

176. *Id.* at 636 (emphasis added).

177. *Id.*

Both courts in *Lensen* and *Bird*, respectively, concluded that a procedural change was limited to the *process* of the criminal grand jury in its indictment role and the process of the Executive in his charging of a defendant by information. Apart from the *process* are the criminal grand jury's rights and duties, which are the *substance*. These rights and duties include the ability to investigate and charge felonies (expressly given in the constitution); the *procedure* may be the steps taken to get there, but the *substance* is the act of investigating and charging.

Penal Code section 917(b)'s removal of felony charging by the criminal grand jury for a particular type of case is not a *procedural* change—it is a *substantive* change. Because the ability to charge felonies is the core right and duty of the criminal grand jury, removing the ability to charge any felony results in changing the *substance* of what the grand jury does. As of 2016 in California, there is no question of procedure or how to charge a peace officer fatal force case by indictment because it has been completely removed from the indictment option.

Because the Legislature had *no* substantive regulatory powers concerning the criminal grand jury, and removing the duty of charging peace officer fatal force cases from the criminal grand jury is a substantive change and *not* procedural, the Legislature does *not* have the authority to make this change.<sup>178</sup>

#### 4. More Recent Cases Have Continued to Hold That the Legislature Is Involved Only With Grand Jury Procedure

In *Daily Journal Corp. v. Superior Court of Orange County*, the court considered whether the superior court had the inherent authority to order the release of criminal grand jury materials after the investigation was finished, and no indictments were returned (or asked for), when no statute provided for such release.<sup>179</sup> The court mainly discussed grand jury secrecy law and practice, but also noted other points that are relevant to the issue herein. The court discussed, “[a]lthough the grand jury was originally derived from the common law, the California Legislature has codified extensive rules defining it and gov-

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178. *Lensen* and *Bird* do speak to procedure, but neither expressly hold that the Legislature may *not* regulate substance. That rule comes, only impliedly, from *Fitts*, where it says the Legislature can provide for the grand jury for all questions “not expressly covered by the constitution.” Since the Constitution expressly provides the grand jury may indict felonies, it follows that taking such core indictment power away, even for only a class of offenses, abrogates the grand jury's basic constitutional power.

179. *Daily Journal Corp. v. Superior Court*, 20 Cal.4th 1117 (1999).

erning *its formation and proceedings*, including provisions for implementing the long-established tradition of grand jury secrecy.”<sup>180</sup>

The court cited *Fitts* and then noted that “[t]he California Constitution, as adopted in 1879, left to the Legislature the adoption of specific rules *for the operation of the grand jury*.”<sup>181</sup>

Neither the grand jury nor the court has the “intrinsic” or “inherent” power to disclose grand jury testimony—this simply cannot be done unless authorized by the Legislature.<sup>182</sup> The court also recognized the significance that “no California case over the last century *since the California grand jury was constitutionally established* has permitted transcripts of testimony before a criminal grand jury to be disclosed based only on a court’s inherent or its supervisory role over the grand jury.”<sup>183</sup>

In *Daily Journal Corp.*, the lower court had no inherent authority to release grand jury materials where no indictment had been returned and no statute authorized this.<sup>184</sup> Likewise, the grand jury itself could not do this because, by common law, such material was secret.<sup>185</sup> Since grand jury procedural law is no longer changed by common law, but instead by the Legislature, this grand jury material could not be released, unless this had been statutorily authorized—which it had not.<sup>186</sup>

The issue in *People v. Superior Court of Santa Clara County (Mouchaourab)* was whether an indicted defendant was entitled to production of the nontestimonial parts of a grand jury proceeding for the purpose of preparing a Penal Code section 995 motion.<sup>187</sup> The court discussed grand jury secrecy at length, and provided some insight into early California grand jury law in this regard:

The secret grand jury has been a part of California’s criminal justice system since its beginning. In 1849, the first California Constitution provided that no person would be held to answer for a

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180. *Id.* at 1122 (emphasis added).

181. *Id.* at 1125 (emphasis added). The court also discussed that the Legislature had codified the common-law rule of grand jury secrecy, and had provided some statutory exceptions to it. *Daily Journal Corp. v. Superior Court*, 20 Cal.4th at 1125 (discussing *People v. Tinder* 19 Cal. 539, 545 (1862)).

182. *Daily Journal*, 20 Cal.4th at 1128.

183. *Id.* at 1130 (emphasis omitted and added).

184. *Id.* at 1120.

185. *Id.* at 1128.

186. *Id.* at 1129–1130.

187. *People v. Superior Court of Santa Clara County (Mouchaourab)*, 78 Cal.App.4th 403 (6th Dist. 2000). A Penal Code section 995 motion is made by the defense to challenge the sufficiency of an indictment or information on various legal grounds.

capital or infamous crime “unless of presentment or indictment of a grand jury.” *The common law requirement of secrecy in grand jury proceedings was first codified in 1851 in the Criminal Practice Act (hereafter, the Act), and was maintained when California enacted its first Penal Code in 1872 . . .* Although the grand jury was originally derived from the common law, the California Legislature had codified extensive rules defining it and *governing its formation and proceedings*, including provisions for implementing the long-established tradition of grand jury secrecy . . . .<sup>188</sup>

Finally, when analyzing SB 227 in terms of legislative overreaching beyond mere procedure, one should also examine *Mendoza v. State*.<sup>189</sup> *Mendoza* notes that the Legislature may exercise “any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution,”<sup>190</sup> and any “doubt should be resolved in favor of the Legislature’s action.”<sup>191</sup> However, looking beyond these standard rules of statutory construction is quite instructive. *Mendoza* was a mandamus action brought by the Los Angeles Unified School District against the State of California, when the Legislature passed a statute (“the Romero Act”) to transfer control of the school district to the Los Angeles mayor.<sup>192</sup> After duly noting the above presumptions of constitutionality and rules of statutory construction, the court exercised its ultimate authority as arbiter of the constitutionality of statutes to find the Romero Act unconstitutional on multiple grounds, and affirmed the trial court’s order granting the school district’s writ.<sup>193</sup> Its discussion of legislative overreaching therein is eerily prescient to the current situation:

This is nothing more than an end-run around the Constitution. If article IX, section 16 [of the California Constitution] is to mean anything, it must mean that charter cities can not only choose the composition of their boards of education, but that charter cities are guaranteed freedom from legislative interference even when the Legislature is of the opinion that they have made the wrong choice.<sup>194</sup>

In the El Dorado test case, if Article I, section 14 (formerly section 8),<sup>195</sup> allowing criminal offenses to be prosecuted by information or indictment, is to mean anything, it must mean that grand juries

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188. *Id.* at 414 (emphasis added) (quoting CAL. CONST. of 1849, art. I, § 8; and *Daily Journal*, 20 Cal.4th at 1122).

189. *Mendoza v. State*, 149 Cal.App.4th 1034 (2007).

190. *Id.* at 1050–51.

191. *Id.* at 1051.

192. *Id.* at 1040.

193. *Id.*

194. *Id.* at 1053.

195. CAL. CONST., art. I, § 14 (formerly CAL. CONST. of 1849, art. I, § 8).

and prosecutors in choosing to inquire and indict any and all felonies are shielded from legislative interference even when the Legislature is of the opinion that they have made the wrong choice.

**C. Penal Code Section 917(b) is Unconstitutional as Legislative Overreaching Upon the Powers of Each of the Other Branches of Government, in Violation of the Separation of Powers Doctrine**

**1. The New Law Impairs the Court's Exercise of its Constitutional Power and Fulfillment of its Constitutional Function (to the Extent the Grand Jury Is Considered an Arm of the Court)**

The indictment grand jury is a hybrid institution of constitutional origin, empaneled by the Court<sup>196</sup> but empowered to conduct inquiries and return charges as part of the Executive.<sup>197</sup> To the extent the indictment grand jury is an arm of the court, cases prohibiting legislative enactments that diminish the jurisdiction of the court directly apply. Even considering only the grand jury's hybrid capacity, such case law preventing the Legislature from disturbing the constitutional jurisdiction and powers of a separate branch of government are still closely analogous and helpful.

California cases have long recognized that "the Legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not 'defeat' or 'materially impair' a court's exercise of its constitutional power or the fulfillment of its constitutional function."<sup>198</sup> In *Selby v. Oakdale Irriga-*

196. See, e.g., CAL. PENAL CODE § 895; 896; 904; 914 (West 2016).

197. See, e.g., CAL. PENAL CODE § 923; 934; 935; 939 (West 2016).

198. *Superior Court v. County of Mendocino*, 13 Cal.4th 45, 58–59 (1996); see also, *Solberg v. Superior Court*, 19 Cal.3d 182, 191–92 (1977) ("[T]he constitutional jurisdiction and powers of the superior court . . . can in no ways be trespassed upon, lessened or limited by the legislature."). Accordingly, a 1923 California Supreme Court case affirming a District Attorney's bringing of a nuisance abatement action and injunction against Eureka establishments violating Prohibition:

the jurisdiction to abate a nuisance is not derived from the state statute but from the constitution. This jurisdiction, we held in the case of *Carse v. Marsh, supra*, [189 Cal. 743] was vested in the superior court without any state legislation whatever. Such jurisdiction being thus vested by the constitution itself, could not be taken away even by an express statutory provision attempting so to do.

In *re Brambini*, 192 Cal. 19, 39 (1923). See also, *Coldthirst v. Southern Pac. R. Co.*, 49 Cal.App. 525, 527 (1920) ("Manifestly, the legislature itself could not change the jurisdiction that has been conferred upon the various courts by the constitution, although it may regulate the mode or manner in which the jurisdiction of a court may be invoked or challenged.").

*tion District*, the petitioner sought mandate in the courts to compel the irrigation district to pay the interest on its matured bonds that petitioner owned.<sup>199</sup> Respondent Oakdale Irrigation District attempted to defend its action by citing a 1933 legislative amendment to the California Irrigation District Act (section 113), which purported to “limit the right of anyone to bring [such] a proceeding [ ] against the board of directors of an irrigation district unless the holders of ten percent or more of the duly issued outstanding and unpaid bonds of the district joined in such an action.”<sup>200</sup> The Third District Court of Appeal quickly brushed aside Respondent’s defense:

As to the right of the parties to prosecute this action we agree with counsel that section 113 [ ], added to the California Irrigation District Act by an act of the legislature approved May 9, 1933, is ineffective for any purpose. Its unconstitutionality is so apparent that citation of authority seems needless. . . . It is evident that the legislature has no power to limit the right of anyone whose property interests have been invaded, to seek redress through the courts unless joined by others owning like property.<sup>201</sup>

In the case of SB 227, the Legislature’s unprecedented act of denying grand jury jurisdiction to an entire class of cases is equally “ineffective for any purpose” and its unconstitutionality “so apparent.”<sup>202</sup> To prevent the Executive from using a constitutionally-established arm of the court, the grand jury, and indeed to prevent the grand jury itself to perform its constitutional function of considering and voting on indictments with prosecution guidance, on an entire class of cases, is beyond Legislative power.<sup>203</sup>

The facts and ruling in *United States v. R. Enterprises*<sup>204</sup> is starkly analogous to the situation in the El Dorado test case, both in regard to litigant efforts to quash grand jury subpoenas and the broad power of the grand jury itself. In *R. Enterprises*, a federal grand jury in Virginia investigating interstate transportation of obscene materials issued subpoenas for corporate books, records, and videotapes from defendant companies (all owned by one man).<sup>205</sup> The companies moved to quash the subpoenas and, when the District Court denied the motion to quash and defendants still refused to comply, the District Court

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199. *Shelby v. Oakdale Irrigation Dist.*, 140 Cal.App. 171 (3d Dist. 1934).

200. *Id.* at 177.

201. *Id.* at 176–77.

202. *Id.*

203. *Id.*

204. *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991).

205. *Id.* at 293.

held defendant in contempt.<sup>206</sup> The United States Supreme Court held that the District Court properly refused to quash the subpoenas.<sup>207</sup> In so holding, it noted the expansive role of a grand jury inquiry in American jurisprudence:

The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." . . . The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'"<sup>208</sup>

Similarly, in California appellate case *M.B. v. Superior Court of Los Angeles*, a Los Angeles criminal grand jury investigating allegations of molestation by priests issued subpoenas duces tecum for documents, including personnel files, in the hands of the Archdiocese.<sup>209</sup> The trial court denied the priests' motions to quash the subpoenas, and the Court of Appeal for the Second District affirmed, holding that the grand jury may, based on both common law and statute, issue such subpoenas.<sup>210</sup> In its discussion, the court observed:

[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.<sup>211</sup>

In enacting Penal Code section 917(b), the California Legislature stripped the grand jury's power of inquisition over a critically important class of felony acts affecting our communities by not allowing this

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206. *Id.* at 295.

207. *Id.* at 296–97.

208. *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)) (internal citation omitted).

209. *M.B. v. Superior Court*, 103 Cal.App.4th 1384 (2d Dist. 2002).

210. *Id.* at 1396.

211. *Id.* at 1394–95 (quoting *United States v. Dionisio*, 410 U.S. 1, 13 n. 12 (1973)).

constitutional and historically ancient body of selected citizens to even begin their labors, let alone conclude them.

## **2. The New Law Violates Separation of Powers by Impairing the Constitutional Right of the Executive to Prosecute Cases Using Constitutional Choices Within its Prosecutorial Discretion**

It cannot be disputed that the Executive can constitutionally choose which charging method to employ. Cases are replete in this regard.<sup>212</sup>

By enacting Penal Code section 917(b), the Legislature attempted to tie the hands of a separate and equal branch of government, the Executive, in utilizing the exercise of prosecutorial discretion, a core function of its job. The Legislature may believe that the prosecution still maintains discretion to investigate peace officer fatal force cases themselves and, if ethically appropriate, to file criminal charges by way of complaint, preliminary examination, and information. However, for the 166 years since Statehood, California prosecutors have had the choice to proceed on felonies by way of indictment (indeed until 1879, indictment was the only choice). As of January 1, 2016, that choice was legislatively removed, and the statute<sup>213</sup> that did so is unconstitutional.

## **3. SB 227's Newly-Enacted Sections 918 and 919 Do Not Save the Statute From Unconstitutionally Impinging on the Grand Jury's Substantive Jurisdiction**

Penal Code section 917(a) remains unchanged in affecting the grand jury's constitutionally-established power to inquire into public

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212. See, e.g., *People v. Carlton* 57 Cal. 559, 561–562 (1881) (“[I]t is left to the discretion of the district attorney to prosecute either by indictment or information. . . .”); *People v. Goodspeed*, 22 Cal.App.3d 690, 704 (4th Dist. 1972) (emphasis added) (“[T]he courts of this state have held the Constitution and statutes of California authorizing a prosecutor to proceed against an accused either by indictment or information, *at his option*, are constitutional.”); *Hawkins*, 22 Cal.3d 584, 592 (“[T]he prosecuting attorney is free in his completely unfettered discretion to choose which defendants will be charged by indictment rather than information . . . .”); *People v. Schlosser*, 77 Cal.App. 3d 1007, 1010 (3d Dist. 1978) (“[I]t is clear from the decisions that a district attorney is free to use either of the two vehicles to bring a defendant to trial.”); *Bowens v. Superior Court of Alameda County*, 1 Cal.4th 36, 54 (1991) (Mosk, J. dissenting) (“[T]he People may prosecute all defendants by indictment; or they may prosecute all by information; or they may choose to prosecute some by indictment and some by information False.”); *People v. Carrington* 47 Cal.4th 145, 180–81 (2009) (“[I]n the prosecution of a felony, the People may proceed ‘either by indictment or by information (CAL. CONST., art. I, §14).’”).

213. CAL. PENAL CODE § 917(b).

offenses triable within the county, and to present them to the court for indictment. It is the new section 917(b)<sup>214</sup> which excepts the class of cases involving peace officer fatal force from grand jury inquiry, but exempts section 918<sup>215</sup> from that ban. Section 918 concerns the curious, and largely historically vestigial matter of grand jury *presentments*, charging documents initiated by the grand jury on their own, without involvement by the prosecution. This presentment authority of the grand jury was already in disuse in 1895.<sup>216</sup> Presentments were largely repealed in 1905.<sup>217</sup>

Some may claim that changes to Penal Code section 919<sup>218</sup> also saved the grand jury's constitutional power to investigate peace officer fatal force cases. However, that claim misreads the statutory changes, which, under careful scrutiny, fall back upon the same disused and vestigial section 918. Section 919 authorizes grand jury inquiry into prisons and corrupt misconduct in office. Subsection (c) was expressly amended by SB 227 to disallow such grand jury inquiries into peace officer fatal force cases involving detained persons. Again, as with section 917, an exception to this area of disallowed inquiry was made by express reference to section 918. Any road leading back to section 918 is a legal dead end. The grand jury may not legally investigate crimes without conducting a formal inquiry that may lead to an indictment, as allowed in the initial section 917. Any Legislative mentions of section 918's outmoded presentment authority should effectively be considered legal nullities.

However, anyone who understands (or strives to understand) grand jury actual practice can ascertain fatally significant *practical* problems with any current use of the grand jury's presentment authority, without assistance of "the prosecuting officer to attend the

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214. "Except as provided in Section 918, the grand jury shall not inquire 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 by the peace officer . . ." CAL. PENAL CODE § 917(b).

215. "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." CAL. PENAL CODE § 918.

216. In Re Grosbois, 109 Cal. 445, 448 (1895).

217. See *Fitts*, 6 Cal.2d at 235.

218. The grand jury shall inquire into the willful or corrupt misconduct in office of public officers of every description within the county. Except as provided in Section 918, this subdivision does not apply to misconduct 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 by the peace officer . . .

CAL. PENAL CODE § 919(c).

grand jury and advise them in their investigation.”<sup>219</sup> El Dorado County, like many smaller counties in California,<sup>220</sup> does not maintain a standing criminal or indictment grand jury.<sup>221</sup> These jurisdictions have their prosecutors call upon their courts to empanel an indictment grand jury to hear a specific case or anticipated group of cases within a particular time period, up to a year, but are often discharged earlier.<sup>222</sup> If there is no currently operating indictment grand jury in such counties as in the El Dorado test case, how can the Legislature’s saving grace section 918 ever be triggered, as there would be no “member of a grand jury” to know of a public offense in order to “declare it to his fellow jurors, who may thereupon investigate it”?<sup>223</sup> Some larger counties maintain a standing indictment grand jury for various periods of time up to a year.<sup>224</sup> Such standing grand juries could at least begin a section 918 investigation on their own, but that investigation would surely die on the vine, given the following practical issues:

Who would call the standing indictment grand jury to session to investigate?

Who would subpoena potential witnesses, by what process, and with what agency for service of process, since the grand jury has long been disallowed from hiring persons to investigate crime?<sup>225</sup>

Who among the lay jurors would respond to any witness motions to quash their subpoenas (the precise legal maneuver that occurred in El Dorado), or argue the merits of their opposition in court (since the District Attorney is not allowed under the Legislature’s scenario)? And at county expense?

Under section 918, there is no indictment; without an indictment, there can be no transcript of proceedings under current law.<sup>226</sup> So to whom can this section 918 grand jury investigation be referred,

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219. *Grosbois*, 109 Cal. at 448.

220. *E.g.*, Sonoma, San Mateo, Santa Barbara.

221. Penal Code § 904.6 allows for an indictment grand jury in every county, in addition to the normal civil or watchdog grand jury. It was enacted in 2006 to correct the challenge of the civil grand jury (often appointed with volunteers or citizens simply known to that County’s judges) issuing indictments that violate the federal constitutional mandate of fair-cross section representation in jury selection. CAL. PENAL CODE § 904.6 (2016); *see also* *Duren v. Missouri*, 439 U.S. 357 (1979).

222. *See* CAL. PENAL CODE § 904.6(c) (2016).

223. *See infra* Part III.

224. *E.g.*, Los Angeles, San Francisco (4 month term), San Diego (one month term).

225. *See* *Allen v. Payne*, 1 Cal.2d 607, 608 (1934).

226. CAL. PENAL CODE § 938.1(a) (2016).

and in what form, without violating the core principal of grand jury secrecy?

## V. Conclusion

Transparency in prosecution charging decisions is laudable, and potential criminal overreaching by the very peace officers charged to keep the peace should be fully, fairly, and ethically examined. However, SB 227 was poorly conceived, suffers from unintended consequences, and cannot be saved by a vestigial presentment law with no legal or practical effect. While the policy merits of such legislation failed to move our state Legislature, the true fatal flaw in SB 227 is its unconstitutionality, its legislative overreaching. The Legislature may not approve of the grand jury hearing these, or indeed, any cases, as the history of SB 227 makes clear. Yet, the Legislature also does not have the power to take away constitutionally-conferred jurisdiction over cases; it does not have the power to subvert an equal branch of government's charging decision and its manner of exercising its core discretion to file charges. SB 227 enacted Penal Code section 917(b), which should not stand. It will be up to the appellate court to grant El Dorado District Attorney's Writ to declare this statute unconstitutional and compel the Respondent Superior Court to reverse its earlier order quashing grand jury subpoenas in the Kris Jackson case. That case deserves its day in the constitutional forum of the local prosecutor's choosing, just as California prosecutors have been so choosing since statehood. The final chapter of peace officer fatal force cases in California has yet to be written.

## VI. Epilogue

On January 10, 2017, the Third District Court of Appeal issued and certified for publication its unanimous opinion in *The People v. the Superior Court of El Dorado County*, written by Acting Presiding Justice Butz and signed by Justices Mauro and Murray.<sup>227</sup> As discussed earlier,<sup>228</sup> Petitioner, the El Dorado District Attorney, argued primarily that the Legislature's SB 227 was an unconstitutional removal of the substantive jurisdiction and power of the California grand jury, a body established by the state Constitution. Petitioner argued, as noted above,<sup>229</sup> that this statute was the first such restriction on the grand

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227. *People v. Super. Ct. of El Dorado Cty.*, 7 Cal.App.5th 402, 406 (3d Dist. 2017).

228. *See supra* Part IV.

229. *See supra* section IV.B.

jury's indictment charging powers since statehood.<sup>230</sup> Petitioner further argued that the Legislature violated the principle of the separation of powers. Finally, Petitioners noted that California Penal Code section 918's presentment statute cannot protect SB 227's limitation to section 917, because that presentment authority is both legally outmoded and practically ineffective. The Appellate Court accepted *every one of these arguments*, granting Petitioner's relief, which ordered the El Dorado Superior Court to vacate its orders quashing the prosecution subpoenas and dismissing the grand jury, and which unequivocally declared SB 227 to be unconstitutional.

The appellate opinion's primary holding states:<sup>231</sup>

Having now delivered this lecture on grand jury procedure, we must confront the sui generis nature of section 917, the first legislative effort in 167 years to constrict the grand jury's power under the Constitution to exercise its power of indictment. . . . [W]e cannot reach a conclusion other than to find that the Legislature does not have the power to enact a statute that limits the constitutional power of a criminal grand jury to indict any adult accused of a criminal offense. To allow the Legislature to restrict this constitutional role in part would be to concede the power to restrict it in its entirety, a position that has never been endorsed in any precedent in the entire history of our jurisprudence, and which was specifically withheld from the Legislature in the enactment of the Constitution of 1879. *We therefore must find that the amendments to section 917 are unconstitutional on this basis.*<sup>232</sup>

The opinion's lengthy discussion of California grand jury history emphasized that this institution, originally based in common law, had become a body created by Constitution (both in 1849 and in 1879).<sup>233</sup> The appellate court then emphasized that the Legislature was granted plenary authority over "all questions affecting the grand jury *not expressly covered by the Constitution.*"<sup>234</sup> California constitutional history, providing for the availability of both indictment and information as charging tools at the choice of the prosecution, establishes that the Legislature does not have the power to eliminate one such choice.<sup>235</sup> Moreover, despite RPI assertions to the contrary, the Legislature's action on Penal Code section 917 was not a simple procedural matter

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230. *See supra* Part IV.

231. *El Dorado Cty.*, 7 Cal.App.5th at 406 (3d Dist. 2017).

232. *Id.* at 413. (citing *Fitts v. Superior Court*, 6 Cal.2d 230, the primary case relied upon by Petitioner) (emphasis added).

233. *Id.* at 411–12.

234. *Id.* at 411 (citing *Fitts v. Superior Court in and for Los Angeles County*, 6 Cal.2d 230 (1936)).

235. *Id.* (citing *People v. Bird*, 212 Cal. 632, 637 (1936)).

within its powers, because “the *effect* of this *procedural* change is nonetheless an unconstitutional restriction on the express provision for the grand jury’s ability to indict adults.”<sup>236</sup>

Having declared the amended section 917 unconstitutional, the appellate court did not need to consider the petitioner’s alternative argument that the statute violated the separation of powers principle by limiting the executive’s charging authority. However, the opinion reinforced the unconstitutional impact of the Legislature’s action by articulating a very close analogy to the concept of separation of powers. The appellate court’s historical analysis stated that the criminal grand jury is not part of the three branches of government, but, rather, “a *constitutional fixture* in its own right that does not belong to any branch and ‘serv[es] as a kind of buffer or referee between the Government and the people.’”<sup>237</sup> Therefore, while the separation of powers doctrine does not strictly apply to a constitutional body outside the three-part form of our government, the concept is the same: the Legislature simply “cannot act to defeat or materially impair the inherent constitutional power of another entity.”<sup>238</sup>

The appellate court rejected the proffered section 918 presentment statute defense. Calling the presentment “a dead letter of criminal procedure,”<sup>239</sup> the justices detailed the “significant practical difficulties”<sup>240</sup> of grand jury self-investigations when a grand jury may not even be convened at the time, would have to obtain and examine witnesses without prosecution assistance, and would be unable to gain the assistance of any investigators. All such points were raised by petitioners as well as the authors herein.<sup>241</sup>

Finally, the appellate opinion began and ended in a discussion of the Legislature’s stated goal for SB 227, to achieve *greater transparency in peace officer fatal force cases*. Noting such a goal to be salutary, the appellate court, in dicta, declared this statutory means to that end to intrude on “the *constitutional* grant of authority to the criminal grand jury to issue an indictment after inquiry, which taken to its logical

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236. *Id.* at 414 (emphasis in original).

237. *Id.* at 408 n.5 (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)) (emphasis in original)).

238. *Id.* at 414 (citing *Steen v. Appellate Div. Super. Ct.*, 59 Cal.4th 1045, 1053 (Cal. 2013)). It is worth noting that the Third District Court of Appeal, at footnote 10, similarly cited to the analogous situation in *Mendoza v. State of California*, 149 Cal.App.4th 1034 (2007). See *El Dorado Cty.*, C081603 2017 WL 83809 at 5 n. 10. For a discussion on *Mendoza*, which was also cited by Petitioner, see *supra* Part IV.B.4.

239. *El Dorado Cty.*, 7 Cal.App.5th at 409.

240. *Id.* at 414.

241. See *supra* Section IV.C.3.

conclusion would allow the Legislature by statute to abrogate indictments entirely for all classes of offenses.”<sup>242</sup> The opinion, in dicta, noted that the Legislature could seek a constitutional amendment to accomplish the end it sought by statute in modifying section 917 to disallow peace officer fatal force cases being indicted by grand juries. Alternatively, it suggested a less cumbersome fix of reforming the (arguably) purely procedural rules of grand jury secrecy in such cases—a point made by both petitioner in its briefs and in oral argument.<sup>243</sup>

A prosecutor’s duty, as part of the executive branch, is neither to make nor interpret our laws, but to enforce them. However, it is certainly within the duties of an ethical prosecutor to seek legal venues to test laws when they appear to be unconstitutional. That was done, so far successfully, in this situation, restoring to the venerable institution of the grand jury its rightful power to indict all felony crimes in California. Still, the final chapter of peace officer fatal force cases in California remains unwritten:<sup>244</sup> The California Supreme Court has yet to weigh in on this statute, and there may be more legal challenges outside the Third District. One final observation is worth mentioning: Ethical prosecutors must base their prosecutions, before the grand jury or any legal forum, upon fact, not upon assumption or antipathy. They must also follow the rules of law and the state Constitution. It behooves our state Legislators to observe the same behaviors in their crafting of our state laws.

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242. *El Dorado Cty.*, 7 Cal.App.5th at 406. This is likely an acknowledgement of the legislative history cited, which suggests a future abolishment of the criminal grand jury entirely not just in this limited class of cases. For a discussion on the legislative history, see *supra* Section II.B.

243. For a discussion on this point, see *supra* Section II.B.

244. See *supra* Part V.