March 14, 2017

The Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street, Fourth Floor
San Francisco, CA 94102

Amicus letter supporting request for review in *People ex rel. Pierson v. Superior Court*, S240238, reported below at 7 Cal. App. 5th 402, review filed (Feb. 22, 2017).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

All three California affiliates of the American Civil Liberties Union urge the Court to grant review in this case sua sponte.

I. Interests of Amici

Proposed Amici are the California affiliates of the American Civil Liberties Union (ACLU).[1] The ACLU is a national, nonprofit, nonpartisan civil-liberties organization with more than 1,300,000 members dedicated to the principles of liberty and equality embodied in both the United States and state constitutions and our nation's civil-rights laws.

The ACLU's California affiliates supported SB 227 on the grounds that reform was needed because "prosecutors fully control grand jury proceedings with no meaningful oversight":

> The proceedings lack transparency because they are not open to the public, and transcripts of the proceedings are never made publicly available if no indictment is returned. To add, the proceedings are not adversarial (defense attorneys do not participate) and there are no judges present.[2]

[1] The ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties.

[2] Letter from ACLU to the Honorable Edmund G. Brown, Jr. in Support of S.B. 227 (July 23, 2015).

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The ACLU continues to support the legislation and believes that it is constitutional.

II. This Court should grant review.

As its legislative history shows, SB 227 was passed out of concerns that prosecutors use grand juries to "pass the buck" in cases of officer-involved shootings: that the grand-jury process allows prosecutors to avoid the "wrath of the police and their powerful unions" that they would incur by vigorously prosecuting their partners in law enforcement, and also to avoid the "wrath of the community" they would face if they refused to bring charges at all against police officers.[3] The bill was opposed by both the California District Attorney Association and the California Police Chiefs Association (POA).[4] The nine groups listed as supporting the bill do not include any law-enforcement agency or organization.[5]

While it was not surprising that the District Attorney Association and the POA were joined in opposing the bill, it is surprising and unfortunate that those same groups were the only parties that litigated this case in the courts below. As the Court of Appeal noted, the District Attorney "deliberately" waited six months for the new law to come into effect before convening a grand jury after a fatal officer-involved shooting, while notifying the POA in advance of this litigation strategy. 7 Cal. App. 5th at 407. The El Dorado District Attorney–along with five other District Attorneys and the California District Attorney Association as amici – participated in the Court of Appeal proceedings, arguing that the statute was unconstitutional, with lawyers for the police union and the Chief of Police arguing the other side of that question. *Id.* at 405, 406 & n. 3. After the appellate court invalidated the statute, the union, the Chief, and the City chose not to file a petition for review.

The Court of Appeal did not have a diversity of voices before it when it invalidated SB 227; in fact, the parties on both sides of the case had originally joined in opposing the bill. Making the one-sided nature of this case more disturbing is that the legislative history shows SB 227 was prompted by concerns about prosecutors relying on the secrecy and lack of transparency and accountability in

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[3] June 15, 2015 Assembly Committee on Public Safety Bill Analysis of S.B. 227 at 8 (quoting Hon. LaDoris Hazard Cordell, *Grand Juries Should be Abolished* (Slate Dec. 9, 2014)), available at http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_227_cfa_20150615_102234_asm_comm.html.

[4] *Id.* at 14-15. The California Grand Jurors' Association also opposed the bill. *Id.*

[5] California Attorneys for Criminal Justice, the California Public Defenders Association, California State Conference of NAACP, the Criminal Trial Lawyers Association of Northern California, the Free Indeed Reentry Project, the Friends Committee on Legislation of California, the Los Angeles Urban League, the Office of the Independent Police Auditor for the City of San Jose, and the San Francisco Public Defender. *Id.*

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choosing the grand jury route in cases involving police officers' use of excessive force.

This unusual lineup of attorneys and parties would itself argue for this Court to take the step of granting review so that this important issue is more fully presented. However, in addition to this, the letters from the Attorney General and Senator Mitchell raise substantial questions as to the correctness of the Court of Appeal's decision, some of which the court below did not address or the parties did not raise.

For example, the court's opinion does not mention any of the history of the key constitutional provision that the Attorney General discusses at pages 3 and 4 of his letter requesting review, history suggesting that the framers of our constitution intended to provide the Legislature with significantly more power over grand juries than the Court of Appeal concluded.

Nor does the opinion below adequately address this Court's precedents relating to the scope of legislative control over the grand jury. This Court has repeatedly made clear that "the grand jury's powers are only those which the Legislature has deemed appropriate. Attempts to exercise powers other than those expressly conferred by statute have been consistently rebuffed." *McClatchy Newspapers v. Super. Ct.*, 44 Cal. 3d 1162, 1179 (1988) (collecting cases); *see id.* ("[T]he grand jury acts without authority when its action is not based upon some specific legislative provision.") (citation omitted).

For example, in holding that grand juries do not have the authority to hire investigators even though they did at common law, this Court rejected the argument that "since the nature of the grand jury is not specifically defined in the Constitution, it is the body as known to the common law, with the same powers." *Allen v. Payne*, 1 Cal. 2d 607, 608 (1934). It also rejected the contention that any such "power exists by implication from the character of our grand jury, as provided for in the Constitution." *Id.* The court below nevertheless based its decision on the theory that the state has "incorporated the institution of the criminal grand jury as known at common law in[to] the Constitution." 7 Cal. App. 5th at 409.

This conclusion is incorrect and unsupported by the cases the Court of Appeal cited, which indicate only that courts should look to the grand jury's common-law roots to interpret or fill-in gaps in the statutory scheme, just as they would with any statute with roots in the common law. *See People v. Super. Ct. (1973 Grand Jury)*, 13 Cal. 3d 430, 441 & n.11 (1975); *see also California Assn. of Health Facilities v. Dep't of Health Servs.*, 16 Cal. 4th 284, 297 (1997) (discussing general rule). One of the cited cases used the common law to hold that when the legislature passed a pair of statutes that were silent on the question of whether unanimity is required "it intended that the jury . . . act as it had acted from time immemorial." *Fitts v. Super.*

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Ct. in & for Los Angeles Cty., 6 Cal. 2d 230, 243 (1936). The other cited case concluded only that grand juries have "the power, stemming from both common law tradition and statutory enactment, to issue subpoenas duces tecum." *M.B. v. Super. Ct.*, 103 Cal. App. 4th 1384, 1391 (2002); *cf. Pierson*, 7 Cal. App. 5th at 412 (citing *Fitts* and *M.B.*).[6] Neither these nor any other cases suggest that the Legislature cannot pass a statute that supplants the common law. Thus, "common law principles [are] *supplementary* to the applicable California statutes relating to grand juries"; they do not override them. *People v. Super. Ct. (1973 Grand Jury)*, 13 Cal. 3d 430, 441 & n.11 (1975) (emphasis added); *accord M.B.*, 103 Cal. App. 4th at 1389-90.

Because the constitution does not require the legislature to preserve the grand jury as it existed at common law, the question therefore is whether the decision below is supported by the text, history, or prior interpretations of the constitutional provision at issue:

> Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.
>
> CAL. CONST. art. I, § 14.

The core holding of the decision below is that this section requires that the District Attorney must have the option–and the sole discretion–to choose between a grand jury and a preliminary examination in every adult criminal prosecution. But neither the text of Article 1 §14, the history of that provision, nor the case cited by the court in support of this position, *People v. Bird*, 212 Cal. 632 (1931), says that, as the Attorney General and Senator Mitchell explain in their letters. The court below compares abolishing the grand jury to abolishing habeas corpus. 7 Cal. App. 5th at 414. But this is not a fair comparison. The right to petition for a writ of habeas corpus is expressly protected by the state and federal charters. *See* U.S. CONST. art. I § 9, cl. 2; CAL. CONST. art. I, § 11. However, no one, including police officers involved in shootings, has a constitutional right to a grand jury in state court. *In re Terry*, 4 Cal. 3d 911, 926 (1971).

III. Conclusion

Article I § 14 provides two alternative procedures for felony prosecutions: they may proceed "as provided by law, either by indictment or, after examination and commitment, by information." Nothing in the text or history of this provision

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[6] This Court has also made clear that the mere fact that a governmental entity is mentioned in the constitution does not affect the Legislature's authority to regulate or even eliminate it. *See California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 253 (2011) (allowing Legislature to eliminate redevelopment agencies, despite constitutional provisions giving them specific rights and powers).

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suggests that prosecutors have a right to make that decision in their sole discretion, much less that any such right is superior to the Legislature's authority to pass laws; to the contrary, the provision expressly requires prosecutors to act "as provided by law." By enacting a law that requires prosecutors to proceed by way of a public preliminary examination rather than a secret grand jury in certain cases involving the misuse of official authority, the Legislature has acted well within it powers.

Because the Court of Appeal invalidated SB 227 without adequately considering the important issues that this case presents, the ACLU joins with the Attorney General and Senator Mitchell in asking this Court to grant review in this matter.

Sincerely,

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PROOF OF SERVICE

I, Veronica Ramirez, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen years, and not a party to or interested in the within-entitled action. I am an employee of the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, and my business address is 39 Drumm Street, California 94111.

On March 14, 2017, I served the following document(s):

Amicus Letter in support of review

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***People ex rel. Pierson v. Superior Court*, S240238**
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__X__ By U.S. Mail enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed with the aforementioned addressees. I am readily familiar with the business practices of the ACLU Foundation of Northern California for collection and processing of correspondence for mailing with the United States Postal Service and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 14, 2017 at San Francisco, California.

_____

Veronica Ramirez, Declarant